Supreme Court, U.S.
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No. 95-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

JOINT APPENDIX

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Petition for Certiorari Filed February 1, 1996
Certiorari Granted April 1, 1996

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RELEVANT DOCKET ENTRIES

I. BEFORE THE TAX COMMISSIONER OF OHIO

1.	6/18/91	Three notices of assessment issued by Tax Commissioner regarding three of General Motors' operating divisions
2.	7/11/91	General Motors' petitions for reassessment
3.	8/16/91	Hearing Before Tax Commissioner on the petitions
4.	10/29/91	Tax Commissioner's Final Determinations issued on the petitions

II. BEFORE THE OHIO BOARD OF TAX APPEALS

A. *General Motors Corporation v. Tracy*, Board of Tax Appeals Case No. 91-001558

1.	12/2/91	Notice of Appeal
2.	5/12/93 and 5/14/93	Testimony Before Hearing Examiner Bradford Arnold
3.	7/9/93	Appellant's Brief filed
4.	12/29/93	Appellee's Brief filed
5.	1/28/94	Appellant's Reply Brief filed
6.	2/7/94	Brief of *Amicus Curiae* Enron Access Corp. in support of appellee filed
7.	2/10/94	Motion for Leave to File Brief *Amicus Curiae* for Enron Access Corp. in support of appellee granted
8.	2/25/94	Decision of Ohio Board of Tax Appeals

B. *General Motors Corporation v. Tracy*, Board of Tax Appeals Case No. 92-000146

1. 12/2/91	Notice of Appeal
2. 5/12/93 and 5/14/93	Testimony Before Hearing Examiner Bradford Arnold
3. 7/9/93	Appellant's Brief filed
4. 12/29/93	Appellee's Brief filed
5. 1/28/94	Appellant's Reply Brief filed
6. 2/7/94	Brief of *Amicus Curiae* Enron Access Corp. in support of appellee filed
7. 2/10/94	Motion for Leave to File Brief *Amicus Curiae* for Enron Access Corp. in support of appellee granted
8. 2/25/94	Decision of Ohio Board of Tax Appeals

C. *General Motors Corporation v. Tracy*, Board of Tax Appeals Case No. 92-000510

1. 12/2/91	Notice of Appeal
2. 5/12/93 and 5/14/93	Testimony Before Hearing Examiner Bradford Arnold
3. 7/9/93	Appellant's Brief filed
4. 12/29/93	Appellee's Brief filed
5. 1/28/94	Appellant's Reply Brief filed
6. 2/7/94	Brief of *Amicus Curiae* Enron Access Corp. in support of appellee filed
7. 2/10/94	Motion for Leave to File Brief

		Amicus Curiae for Enron Access Corp. in support of appellee granted
	8. 2/25/94	Decision of Ohio Board of Tax Appeals

III. BEFORE THE THE SUPREME COURT OF OHIO

A. *General Motors Corporation, Packard Division v. Roger W. Tracy, Tax Commissioner of Ohio*, Supreme Court of Ohio Case No. 94-0642

	1. 03/28/94	Notice of appeal by General Motors Corp. filed
		Amended notice of appeal filed
		Demand for certified transcript filed
	2. 03/30/94	Motion to consolidate case with 94-643 and 94-644 filed
	3. 07/25/94	Appellant's merit brief filed
		Supplement to briefs filed
	4. 09/13/94	Brief of *Amicus Curiae* by Enron Access Corp. in support of appellee filed
		Appellee's merit brief filed
	5. 10/03/94	Reply brief filed
	6. 04/25/95	Oral Argument held
	7. 08/09/95	Decision affirmed
	8. 08/21/95	Motion for Reconsideration filed
	9. 08/28/95	Memo opposing motion for reconsideration filed
	10. 10/04/95	Motion for reconsideration denied and certified copy of judgment entry

sent to clerk. Issuance of Mandate and copy of rehearing entry sent to clerk

11. 02/09/96 — Notice of filing petition for certiorari in U.S.S.C. filed

12. 04/05/96 — Notice of U.S.S.C. granting of petition for writ of certiorari filed

B. *General Motors Corporation v. Roger W. Tracy, Tax Commissioner of Ohio*, Supreme Court of Ohio Case No. 94-0643

1. 03/28/94 — Notice of appeal by General Motors Corp. filed

Amended notice of appeal filed

Demand for certified transcript filed

2. 03/30/94 — Motion to consolidate case with 94-642 and 94-644 filed

3. 07/25/94 — Appellant's merit brief filed

Supplement to briefs filed

4. 09/13/94 — Brief of *Amicus Curiae* by Enron Access Corp. in support of appellee filed

Appellee's merit brief filed

5. 10/03/94 — Reply brief filed

6. 04/25/95 — Oral Argument held

7. 08/09/95 — Decision affirmed

8. 08/21/95 — Motion for Reconsideration filed

9. 08/28/95 — Memo opposing motion for reconsideration filed

10.	10/04/95	Motion for reconsideration denied and certified copy of judgment entry sent to clerk. Issuance of Mandate and copy of rehearing entry sent to clerk
11.	02/09/96	Notice of filing petition for certiorari in U.S.S.C. filed
12.	04/05/96	Notice of U.S.S.C. granting of petition for writ of certiorari filed

C. *General Motors Corporation v. Roger W. Tracy, Tax Commissioner of Ohio*, Supreme Court of Ohio Case No. 94-0644

1.	03/28/94	Notice of appeal by General Motors Corp. filed
		Amended notice of appeal filed
		Demand for certified transcript filed
2.	03/30/94	Motion to consolidate case with 94-642 and 94-643 filed
3.	07/25/94	Appellant's merit brief filed
		Supplement to briefs filed
4.	09/13/94	Brief of *Amicus Curiae* by Enron Access Corp. in support of appellee filed
		Appellee's merit brief filed
5.	10/03/94	Reply brief filed
6.	04/25/95	Oral Argument held
7.	08/09/95	Decision affirmed
8.	08/21/95	Motion for Reconsideration filed
9.	08/28/95	Memo opposing motion for

reconsideration filed

10. 10/04/95 — Motion for reconsideration denied and certified copy of judgment entry sent to clerk. Issuance of Mandate and copy of rehearing entry sent to clerk

11. 02/09/96 — Notice of filing petition for certiorari in U.S.S.C. filed

12. 04/05/96 — Notice of U.S.S.C. granting of petition for writ of certiorari filed

IV. BEFORE THE SUPREME COURT OF THE UNITED STATES

1. 02/01/96 — Petition for Certiorari filed

2. 04/01/96 — Petition for Certiorari granted

THE PUBLIC UTILITIES COMMISSION OF OHIO

GEORGE V. VOINOVICH
GOVERNOR

CRAIG A. GLAZER
CHAIRMAN

The below-signed Secretary or Acting Secretary, duly appointed and qualified official of the Public Utilities Commission of Ohio, in whose custody the books, papers, records, documents and files of said Commission are kept, certifies that the attached is a full, true, correct and complete copy of:

Case No. 82-1086-GA-ARJ

APPLICATION

IN THE MATTER OF THE APPLICATION OF YANKEE RESOURCES, INC., 6500 BUSCH BOULEVARD, COLUMBUS, OHIO 43229 FOR RELIEF FROM COMPLIANCE WITH THE OBLIGATIONS IMPOSED BY CHAPTER 4901, 4903, 4905, 4907, 4909, 4921, 4923, and 4925 OF THE OHIO REVISED CODE.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Public Utilities Commission of Ohio, this 23 day of June, 1992.

/s/ Gary E. Vigorito
Gary E. Vigorito, Secretary
Public Utilities Commission of Ohio

[Seal]

Patricia M. Angel, Acting Secretary
Ronald D. Rose, Acting Secretary
Public Utilities Commission of Ohio

Secretary: Gary E. Vigorito
Upon Assignment,
Acting Secretary: Patricia M. Angel
Ronald D. Rose

[Received Aug. 24, 1982]

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Yankee Resources, Inc., 6500 Busch Boulevard, Columbus, Ohio 43229 For Relief from Compliance with the Obligations Imposed by Chapter 4901, 4903, 4905, 4907, 4909, 4921, 4923, and 4925 of the Ohio Revised Code	)	Case No. 82-1086-GA-ARJ

APPLICATION

NOW COMES Yankee Resources, Inc. (Applicant) and respectfully requests the Honorable Public Utilities Commission of Ohio (Commission) to review Applicant's circumstances with respect to Applicant's ownership of contracts involving the purchase and sale of natural gas and to make a determination as to whether it is a public utility, a natural gas company or a pipeline company as defined by Sections 4905.02, 4905.03(A)(6), or (4)(7) of the Ohio Revised Code (R.C.). If the Commission so determines that Applicant is a public utility, Applicant requests the Commission to grant it the relief from obligations imposed by R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4925.

1. Applicant is an entity which is or anticipates being a party to certain contracts pertaining to the purchase of natural gas from independent Ohio gas producers and from public utilities and the sale of such natural gas from these sources to various entities, including industrial end users, other public utilities and interstate pipeline companies.

Applicant's contracts are or will be of several types: (a) those involving Ohio producers' sale of all natural gas produced from specified wells to Applicant; (b) spot purchases from public utilities; (c) those involving buyers of natural gas who agree to pay Applicant for the natural gas production described in the purchase contracts. Approximately 90% of the volume of natural gas transferred by these contracts is purchased by an interstate pipeline company.

Applicant receives compensation for its role in locating sellers and buyers and assisting them in their transportation arrangements pursuant to purchase and sale contracts. Management of these contracts is involved in the services which Applicant performs. In short, Applicant performs the services of a marketer of contracts for natural gas which services typically include taking legal title to the natural gas.

2. Applicant is not affiliated with, or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas; nor does Applicant engaged in the distribution of natural gas to consumers; nor does Applicant engage in the business of transporting natural gas through pipes or tubing either wholly or in part within the State of Ohio. Applicant has no physical plant through which natural gas is transported. Applicant does not intend to drill wells or become a producer itself.

3. Applicant does not, and never has, held itself out to serve the public.

4. Applicant does not contemplate arranging for the sale of natural gas from all of the contracts which it owns or manages to a single natural gas distribution company.

Some of the parties purchasing natural gas pursuant to the contracts owned and managed by Applicant are located outside the State of Ohio.

5. Applicant's activities with respect to owning and managing contracts are consistent with the state policy to promote Ohio natural gas production. These activities present no threat of

unjust competition to regulated natural gas companies because natural gas supplies flowing into Ohio appear to be overwhelmingly controlled by regulated natural gas distribution companies which have the vast resources to contract with independent producers.

Further, these activities are consistent with the "self-help" program, initiated by the Commission several years ago whereby independent producers and industrial customers were encouraged to enter into natural gas purchase agreements with each other and to arrange for the transportation of such natural gas through the pipelines of regulated natural gas pipelines of Ohio regulated natural gas companies.

6. Applicant's view is that these activities in no way subject it to Commission regulation as contemplated by R.C. Chapter 4905. The statutes and meager case law which exists support the conclusion that Applicant's role as described in the preceding paragraphs do not qualify it as a public utility, a natural gas company, or a pipeline company pursuant to the terms of R.C. Sections 4905.02, 4905.03(A)(6) or 4905.03(A)(7) respectively.

However, should the Commission determine that Applicant is a public utility, Applicant respectfully requests relief from the obligations of R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4925.

WHEREFORE, Applicant respectfully requests the Honorable Commission to determine that it is not a public utility pursuant to R.C. Sections 4905.02, 4909.03(A)(6), or 4905.03(A)(7). In the alternative, in the event the Commission finds that Applicant is a natural gas company public utility, to relieve it from the obligations of R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4925.

Respectfully submitted on behalf of
Yankee Resources, Inc.

By /s/ Sally W. Bloomfield
Sally W. Bloomfield
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Columbus, Ohio 43215
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Its Attorneys

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Yankee Resources, Inc., For Relief from Compliance with the Obligations Imposed by Chapter 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Ohio Revised Code	))))))))	Case No. 82-1086-GA-ARJ

ENTRY

(Found in Appendix to Respondent's Brief in Opposition at 2a-5a)

STATE OF DELAWARE

OFFICE OF SECRETARY OF STATE

I, MICHAEL HARKINS, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY THE CERTIFICATE OF OWNERSHIP OF THE YANKEE GAS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, MERGING YANKEE INTERNATIONAL COMPANY AND YANKEE RESOURCES, INC. CORPORATIONS ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, YANKEE PIPELINE COMPANY A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, PURSUANT TO SECTION 253 OF THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE, WAS RECEIVED AND FILED IN THIS OFFICE THE FIRST DAY OF MARCH, A.D. 1988, AT 5:31 O'CLOCK A.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION SHALL BE GOVERNED BY THE LAWS OF THE STATE OF DELAWARE.

/s/ Michael Harkins
Michael Harkins, Secretary of State

[Seal]
758278118

AUTHENTICATION: 11880667
DATE: 10/04/1988

SECRETARY OF THE STATE OF OHIO

(Please return this form to the Secretary of State's Office, 30 East Broad St., Columbus, OH 43215)

By: _____
Date: _____
Amount: _____

Annual Statement of Proportion of Capital Stock
See Section 1703.07, Ohio Revised Code

1988 Form 7 3/31, 1988

The Yankee Gas Company, a corporation organized under the laws of Delaware, with its principal, office at 425 Metro Place South Dublin Ohio 43017 and its Ohio office located at 655 Metro Place South Dublin Ohio 43017, having assets in Ohio located in the counties of Summit, and having assets located without the State at Virginia, in compliance with Section 1703.07 of the Ohio Revised Code makes the following statement:

1. Said corporation holds license No. 659137, issued on 7/22, 1985

2. Said corporation purpose is Natural gas marketing and distribution

3. The report is made as of 6/30/87, which is the date of the ending of the corporation's accounting period in the preceding calendar year. (See Note No. 2 on reverse side).

4. The book value (exclude goodwill) of Ohio assets is 3,774,414

   (See Note No. 4 on reverse side).

5. Amount of business transacted in Ohio last year was 169,533

   Sums of Items 4 and 5 3,944,007

6. Book value (exclude goodwill) of all assets is 26,521,127

7. Total business transacted in last year was 179,659

Sums of Items 6 and 7 26,700,786

8. a. Number of Authorized shares c/s 8,000 p/s 21,000

b. Number of issued shares c/s 1,170 p/s 1,432

DO NOT USE THIS SPACE

Issued Shares	_____	Decimal	_____
Present Prop.	_____	Prior Prop.	_____
Increase	_____	Fee Due	_____
Penalty (15%)	_____	TOTAL	_____

9. Notice of fees due may be mailed to c/o The Yankee Companies, Inc. 400 Atlantic Ave., Boston, MA----------

10. Corporation's statutory agent in Ohio is Prentice Hall Corp. Systems, Inc.

Agent's address is [addressed crossed out]

[illegible]

(Signed) /s/ [illegible]
/s/ [illegible]
(Name and Title of officer signing)

GAS PURCHASE CONTRACT
BETWEEN
MOBIL NATURAL GAS, INC.
AS SELLER
AND
GENERAL MOTORS CORPORATION
AS BUYER

DATED: June 1, 1988

GM INQUIRY # 19-88

Firm

Revised Sept. 15, 1987

THIS CONTRACT, made and entered into this 1st day of June, 1988, by and between ~~Mobil Oil Corporation~~ Mobil Natural Gas Inc. a New York corporation with offices at 11 Greenway Plaza, Suite 2500, Houston, TX 77046 (hereinafter called "Seller"), and General Motors Corporation, a Delaware corporation with offices at 1829 Hallock-Young Road, Warren, Ohio 44481 (hereinafter called "Buyer").

W I T N E S S E T H:

WHEREAS, a program exists under which Buyer may acquire natural gas by the purchase thereof from Seller and provide for the delivery of such gas to its facilities through natural gas pipelines; and

WHEREAS, Seller owns, controls or has the right to sell and dispose of natural gas to be produced from certain oil and gas leaseholds, or has contracted with others to purchase natural gas with the right to sell and dispose of such gas; and

WHEREAS, Seller's supply of natural gas is located in areas served by the initial receiving natural gas pipeline(s) identified in Exhibit A; and

WHEREAS, Seller has heretofore constructed the necessary gathering system and appurtenant facilities or made the necessary arrangements to gather, deliver and sell natural gas to Buyer; and

WHEREAS, Buyer owns and operates facilities at locations identified in Exhibit B and desires to purchase from Seller quantities of natural gas not to exceed the quantities identified in Exhibit C for use at such facilities, and Seller desires to sell such quantities of natural gas to Buyer at the price and upon the terms and conditions hereinafter stated; and

WHEREAS, all of the natural gas purchased by Buyer hereunder will be delivered by Seller into the initial receiving natural gas pipeline(s) identified in Exhibit A, and Buyer intends to have in place gas transportation contract(s) with the initial receiving natural gas pipeline(s) and any other natural gas

pipeline(s) identified in Exhibit A necessary to transport such gas to Buyer's facilities; and

WHEREAS, a true copy of the aforesaid gas transportation contract(s) will be delivered to Seller;

NOW THEREFORE, the parties hereto, each in consideration of the covenants and agreements of the other, hereby mutually covenant and agree as follows:

ARTICLE I

DEFINITIONS

1. Except where the context expressly states another meaning, the following terms when used in this Contract shall have the following meanings:

(a) Bcf means one billion (1,000,000,000) cubic feet of gas;

(b) British Thermal Unit or Btu — The term "Btu" shall mean the amount of heat that must be added to one pound (avoirdupois) of pure water to raise its temperature from 58.5° Fahrenheit to 59.5° Fahrenheit under standard pressure conditions as set forth at Page 158 of the AGA Measurement Manual copyright date 1963.

(c) Contract Year means in respect of the first contract year, a period of time beginning at 8:00 o'clock a.m. on the day and month specified on Exhibit C and continuing through 7:59 o'clock a.m. on the day and month specified on Exhibit C; for each successive contract year, a period of twelve (12) consecutive months, commencing with the end of the preceding contract year;

(d) Cubic Foot of Gas — The volume of gas which occupies one (1) cubic foot when such gas is at a temperature of sixty degrees (60°) Fahrenheit and at a pressure base of fourteen and seventy-three hundredths (14.73) psia saturated.

(e) Day — A period of twenty-four (24) consecutive hours beginning at 8:00 a.m. local time.

(f) Gas; Natural Gas — Natural gas produced from oil wells or gas wells, of the quality specified in Article VI hereof.

(g) Gas Transportation Contract — Contract between GM or its agent or other representative and a natural gas pipeline providing for the transport of gas to be sold hereunder.

(h) Including — A term which means including but not limited to.

(i) Initial receiving pipeline — The pipeline into which gas is first delivered by Seller for Buyer's account.

(j) Maximum Annual Quantity — The maximum quantity of gas that Seller is required to deliver for Buyer's account in a given Contract Year, as set forth in Exhibit C.

(k) Maximum Daily Quantity — The maximum quantity of Gas that Seller is required to deliver for Buyer's account in a given day as set forth in Exhibit C.

(*l*) Maximum Monthly Quantity — The maximum quantity of Gas that Seller is required to deliver to Buyer in a given month, as set forth in Exhibit C.

(m) Mcf — One thousand (1,000) cubic feet of gas.

(n) MMBtu — One million (1,000,000) British thermal units.

(o) Month — The period beginning at 8:00 a.m. local time on the first day of a calendar month and ending at 8:00 a.m. local time on the first day of the following calendar month.

(p) Natural Gas or Gas shall mean, as the context may require, either natural gas obtained from wells or the residue remaining after the natural gas has been treated for the removal of water, hydrocarbon compounds heavier than methane or contaminants as may be required to be compatible with the initial receiving pipeline transportation specifications.

(q) NGPA — The Natural Gas Policy Act of 1978 and the rules and regulations promulgated thereunder.

(r) Pipeline; Natural Gas Pipeline — The interstate pipeline(s), intrastate pipeline(s), and/or local distribution company(ies) identified as Exhibit A.

(s) Psia — Pounds per square inch absolute.

(t) Point of Delivery or "Delivery Point" means, in respect of gas delivered by Seller for Buyer's account hereunder, any of the points described under Exhibit A-1.

ARTICLE II

INITIAL PROCEDURE

1. Seller agrees that it shall, in the exercise of due diligence, file for all governmental consents and authorizations, if any, necessary for Seller to sell gas for Buyer's account and to deliver such gas to initial receiving pipeline for Buyer's account in accordance with the terms and provisions hereof. Seller, or its agent, will be responsible for making all arrangements necessary to transport and deliver gas to the point(s) of delivery.

2. Buyer agrees that it shall, in the exercise of due diligence, file for or cause to be filed for all governmental consents and authorizations, if any, necessary for Buyer to purchase and receive gas or to have gas received for its account hereunder. Buyer further agrees that it shall, in the exercise of due diligence, install or cause to be installed any facilities not already in place necessary to receive deliveries of gas under this Contract. Buyer will be responsible for making all arrangements necessary to receive and transport gas from the point(s) of delivery.

3. Buyer and Seller acknowledge and agree that Buyer's and Seller's obligations under this Contract are conditional upon the following:

(a) Seller, or its agent, having concluded satisfactory transportation contracts with appropriate pipeline companies to enable transport of gas from the production or acquisition point(s) to the point(s) of delivery.

(b) Buyer, having concluded satisfactory transportation contracts with appropriate pipeline companies to enable receipt of gas at the point(s) of delivery and redelivery to Buyer's facilities identified in Exhibit B.

(c) Buyer, Seller and the initial receiving pipeline maintaining all governmental and regulatory approvals, if any, necessary for Buyer to purchase and receive gas hereunder and for Seller to sell to Buyer and deliver such gas in accordance with the terms and provisions hereof.

(d) Buyer and Seller maintaining all necessary transportation contracts to enable the delivery and receipt of gas.

4. While the conditions in paragraph 3 above remain satisfied, then deliveries of gas under this Contract shall commence within seven (7) days or by another date mutually agreeable in writing, after Seller is notified by both the initial receiving pipeline and Buyer that each is ready to receive the gas and shall thereafter continue during the term hereof in keeping with the terms and provisions of this Contract. If deliveries have not commenced within seven days or by another date mutually agreeable in writing after the initial satisfaction of condition (a) through (d) inclusive in Article II, paragraph 3, and Seller is notified by the initial receiving pipeline that is ready to receive the gas, or if either party shall therefore fail to maintain all necessary contracts and approvals including those in (a) through (d) inclusive in Article II, paragraph 3, either Buyer or Seller may terminate this Contract by giving seven days written notice of such termination to the other party, and thereafter neither party shall have any further obligation to the other whatsoever.

ARTICLE III

SALE AND PURCHASE

Subject to the terms and conditions herein, Seller will sell to Buyer and deliver, and Buyer will purchase from Seller and pay for and cause to be taken a quantity of gas equal to the lesser of (a) the Maximum Annual Quantity identified in Exhibit C or (b) the actual gas usage of Buyer's facilities identified in Exhibit B.

ARTICLE IV

QUANTITY AND TRANSPORTATION

1. Buyer shall notify Seller in writing, not less than ten (10) days prior to the first day of each month during the term of this Contract, of the daily and monthly quantities of gas Buyer proposes to purchase from Seller hereunder during such month, it being understood and agreed, however, that without the prior consent of Seller, neither the daily nor the monthly quantity of gas that Buyer may order or Seller shall be required to make available to Buyer on any day or month shall exceed, respectively, the Maximum Daily Quantity or the Maximum Monthly Quantity set forth by month in Exhibit C. Buyer shall give Seller at least 24 hours notice prior to any proposed change of a daily quantity from that set forth in the nomination provided for in Section 1 of this Article IV. Seller may waive such notice upon request if, in its judgment, conditions permit such waiver. Seller shall notify Buyer of any changes in daily deliveries to initial receiving pipeline for the account of Buyer. The notification required by the prior two sentences shall be made by telephone or other instant communication immediately upon knowledge thereof. Variations by Seller of actual deliveries to initial receiving pipeline for the account of Buyer shall be kept to the minimum permitted by operating conditions, and shall be balanced as soon as practicable.

2. The Maximum Annual Quantity under this Contract are listed on Exhibit C (subject to other provisions of this Contract). In subsequent Contract years, if any, Buyer may increase or decrease the Maximum Annual Quantities by giving written notice thereof to Seller 60 days prior to the beginning of the next Contract Year preceding the year in which the change is to occur. The increase or decrease shall be subject to the approval of Seller. Failure of Seller to respond to Buyer's notice providing for an increase or decrease of the then Current Year Maximum Annual Quantity within 30 days shall be deemed to be acceptance thereof. Whenever the Maximum Annual Quantity is changed, a corresponding change in Maximum Daily Quantity and in the

Maximum Monthly Quantity will be made with the mutual consent of both Buyer and Seller, and a change may similarly be made in Exhibit B to the extent the change in Maximum Annual Quantities are due to a change in the facilities to be served.

3. Sixty (60) days prior to any subsequent Contract Year, if any, Buyer shall provide Seller with a nonbinding estimate of the quantity of gas which Buyer wishes to purchase from Seller during each month of the next Contract Year. And Seller shall, within thirty (30) days thereafter, provide Buyer with a price at which it is willing to sell gas to Buyer hereunder in such Contract Year. If Buyer accepts or does not reject such price within fifteen (15) days thereafter, the contract shall continue for such Contract Year at the price provided by Seller. If Buyer rejects such price, this contract will expire at its termination date and thereafter, or after any earlier termination date, neither party shall have any further obligation to the other whatsoever, except for payments (calculated at the applicable contract price) due or that thereafter become due for gas delivered prior to the termination date, or required to be delivered after the termination date to the initial receiving pipeline to make up for imbalances occurring prior to the termination date.

4. The gas sold and purchased hereunder is to be utilized by Buyer at its facilities identified in Exhibit B. Said Gas will be delivered by Seller for Buyer's account to the Point(s) of Delivery identified in Exhibit A-1 at which points delivery shall be deemed to take place. In the event there is more than one receiving pipeline, Buyer shall include with its notice provided in Article IV, Section 1, the quantities of gas to be delivered to each pipeline. This notification of the proportion of the monthly nomination to be delivered into each receiving pipeline, where there is more than one, shall be subject to the concurrence of Seller, which concurrence shall not be unreasonably withheld. Said gas shall then be transported by the initial receiving pipeline and redelivered by it as provided in Exhibit A in keeping with the terms and provisions of the gas transportation contracts or any subsequent contracts entered into between those parties which may supersede the gas transportation contracts.

Notwithstanding anything to the contrary that may be contained or inferred herein, Seller shall be responsible for making suitable arrangements with the initial receiving pipeline for the first deliveries of the gas provided to be sold and purchased hereunder at the delivery point(s), including absorbing all expenses of transporting gas to the delivery point(s), and Buyer shall be responsible for making suitable arrangements with, and paying initial receiving pipeline(s) for the transportation of said gas after receipt at the delivery point(s) and the redelivery of the same to Buyer.

5. It is recognized that the parties will be unable to control exactly the quantities of gas delivered hereunder and received by the initial receiving pipeline for the account of Buyer on any day, and that the actual quantities received by the initial receiving pipeline for the account of Buyer may vary above or below the actual quantities nominated by Buyer. Such variations shall be considered imbalances and shall be kept to the minimum permitted by operating conditions and shall be balanced as soon as practicable but in no event shall exceed a daily variation of 10%, and a monthly variation of 4%. If, in any month under this contract, beginning with the first complete contract month, Seller fails for any reasons other than force majeure or inability of initial receiving pipeline to take gas Seller has available for sale, to sell to Buyer and deliver to initial receiving pipeline for Buyer's account within the tolerances set forth above, Buyer's full monthly nomination up to the maximum monthly delivery rate set forth by month in Exhibit C, then:

(a) Buyer may, in its discretion, terminate this contract by giving Seller written notice of such termination within thirty (30) days following the last day of the month in which such failure occurs, and

(b) In addition, Seller shall pay Buyer for the lesser of (i) the volume of gas purchased in such month from other sources or (ii) the difference between (A) nominated gas volumes not exceeding the Maximum Monthly Quantity identified on Exhibit C and (B) the quantity actually received during said month of the Contract

Year (such difference shall hereinafter be referred to as the "Deficiency Gas"). The price to be paid by Seller for the "Deficiency Gas" shall be the difference between (i) the actual burnertip cost paid by Buyer not to exceed the minimum price offered by the supplying local distribution company and (ii) the burnertip cost of gas provided to be sold and purchased hereunder.

6. If, in any month during the term hereof, the full quantities nominated by Buyer are not being delivered to Buyer for reasons of force majeure, or any other reason, Seller shall immediately give notice and full particulars of such interruption in writing or by telegraph to Buyer as soon as reasonably possible. Should such interruption occur for reasons other than force majeure and no gas is received for seven (7) consecutive days by the initial receiving pipeline(s) for Buyer's account and Buyer and the initial receiving pipeline(s) are ready and able to receive deliveries of gas for the account of Buyer, Buyer may terminate this Contract by giving twenty-four (24) hours written notice of such termination.

7. If for any reason the full amount of gas nominated by Buyer in accordance with the provisions hereof is not delivered to the initial receiving pipeline by Seller for Buyer's account during any month, within the tolerances specified in Section 5 of this Article IV, then Buyer shall have the right to purchase gas contemporaneously from any other sources to make up for any resulting inability to receive gas from Seller under this Contract, and any such make-up gas so purchased from other sources shall be deducted from the quantity of gas Buyer will purchase from Seller and pay for and cause to be taken as provided in Article III.

8. If, during any month of any Contract Year, Buyer has incurred any Deficiency Gas, the price to be paid by Seller for the Deficiency Gas shall be paid for by Seller within 15 days of the receipt by Seller of billing from Buyer with appropriate supporting data, said billing to be rendered within 30 days of the

end of the month during which Buyer incurred the Deficiency Gas.

9. Buyer will pay for such quantities of gas as are received by initial receiving pipeline for Buyer's account pursuant to this Contract provided that such quantities, within the tolerances specified in Section 5 of this Article V, do not exceed the quantities nominated.

10. If increases in the transportation charges paid by Buyer or other cost increases, or a reduction in the rate schedule of a local distribution company serving Buyer at Buyer's facilities listed on Exhibit B or any other event shall cause the burnertip cost of the gas provided to be sold and purchased hereunder to exceed the burnertip cost under the rate schedule at which Buyer could obtain quantities of equivalent gas from the local distribution company or obtain equivalent volumes of an alternate fuel supply which serves one or more of Buyer's facilities in Exhibit B, then Buyer may (a) give Seller thirty (30) days' written notice to meet the price in the local distribution company rate schedule or price of alternate fuel supplies. If Seller fails to meet that price, then Buyer shall have the right to terminate this Contract by giving Seller a fifteen (15) day written notice of such termination and thereafter neither party shall have any further obligation to the other except that Buyer shall pay any amounts then or thereafter due for gas taken hereunder or that Seller is required to deliver to the initial receiving pipeline after the termination date to make up for imbalances that occurred prior to the termination date; or (b) if the burnertip cost of the gas provided to be sold and purchased hereunder shall exceed the burnertip cost under the rate schedule at which Buyer could obtain quantities of equivalent gas from the local distribution company or obtain equivalent volumes of an alternate fuel supply which serves one or more of Buyer's facilities but not all facilities identified in Exhibit B, then Buyer may give Seller thirty (30) days written notice to meet the price in the local distribution company rate schedule or price of alternate fuel supplies for the quantities under this Contract reasonably attributable to those facilities so affected. If Seller fails to meet the price, then Buyer shall have the right to reduce

the Maximum Annual Quantity, Maximum Monthly Quantity, and Maximum Daily Quantity in Exhibit C by the volumes reasonably attributable to those facilities by giving Seller fifteen (15) days' written notice thereof, and then remove such facilities from Exhibit B.

ARTICLE V

PRICE

1. Subject to the other provisions of this Article V, the price to be paid by Buyer to Seller for gas sold by Seller to Buyer hereunder shall be that amount identified in Exhibit C, it being understood that the total amount due by Buyer to Seller for gas sold each month by Seller to Buyer hereunder shall be determined by multiplying the price provided to be paid for said gas hereunder by the total quantities of gas delivered by Seller to the initial receiving pipeline(s) for Buyer's account during such month in keeping with the provisions thereof.

2. In the event the maximum lawful price authorized by the NGPA, or by any other applicable federal or state statute or law, shall be reduced below the price identified in Exhibit C, such maximum lawful price shall be substituted for the price identified in Exhibit C for as long as said maximum lawful price remains lower than the price set forth in Exhibit C.

3. Seller shall give Buyer credit for increases, if any, in transportation charges incurred by Buyer due to Seller's use of alternate delivery points listed on Exhibit A-2. The amount to be credited by Seller for utilizing alternate delivery points shall be the actual difference in (i) the total monthly transportation charges incurred by Buyer and (ii) the total monthly transportation charges calculated by multiplying the monthly volume delivered by the weighted average of the transportation charges from the delivery point(s) listed on Exhibit A-1. The total amount for increased transportation charges shall be credited by Seller to Buyer on the Seller's following month's invoice.

ARTICLE VI

GAS QUALITY AND DELIVERY PRESSURE

1. The quantities of natural gas delivered and sold hereunder shall conform to the quality and pressure specifications at the point(s) of delivery in accordance with the applicable provisions of the transportation contract between Buyer and initial receiving pipeline identified in Exhibit A.

2. Seller shall deliver all gas provided to be sold and purchased hereunder to the initial receiving pipeline(s) for Buyer's account at a pressure sufficient to allow said gas to enter said pipeline(s) at the point or points of delivery thereof by Seller to said pipeline(s).

ARTICLE VII

MEASUREMENTS

1. The quantities of gas delivered and sold hereunder shall be measured and determined at the point(s) of delivery in accordance with the applicable provisions of the transportation contract between Buyer and initial receiving pipeline identified in Exhibit A.

2. Seller and Buyer agree and acknowledge that testing and measurement of gas delivered hereunder at the point(s) of delivery shall be conducted by the initial receiving pipeline(s). Seller and Buyer hereby agree to accept such testing and measurement as conclusive for all purposes under this Contract. Buyer, upon receipt of notice from the receiving pipelines of an upcoming test of the measurement equipment, shall notify Seller. Buyer or Seller or their respective representatives may elect to witness such test or tests. The accuracy of the measuring equipment of the initial receiving pipeline(s) shall be subject to verification by Buyer and Seller in keeping with the standard procedures therefor of the initial receiving pipeline(s).

ARTICLE VIII

BILLING AND PAYMENT

1. (a) Seller shall forward to Buyer, on or before the twelfth (12th) day of each month, a statement setting forth the volume of gas delivered to the initial receiving pipeline(s) for Buyer's account on behalf of Seller during the preceding month under this Contract, the Btu content, the price and the total amount payable by Buyer therefor. All gas shall be paid for on a Btu basis.

(b) If Seller does not receive information from the receiving pipeline in sufficient time, such that Seller is unable to inform Buyer, on or before the 12th day of each month, of actual volumes delivered to Buyer, Seller shall invoice Buyer based on Buyer's nomination for that month unless Seller delivered less gas from Buyer's nomination, in which event Seller shall invoice Buyer based on the best information then reasonably available. If payment is based on estimates of volumes or if Seller's detailed statement differs from that of the initial receiving pipeline(s), it shall be subject to correction and appropriate credit or additional payment in the following month based on actual volumes delivered for that month.

2. Buyer shall make payment to Seller, pursuant to the statement, on or before the twenty-fifth (25th) day of the month in which the statement is rendered for gas delivered during the preceding month, but Buyer shall not be obligated to pay for any quantities which exceed the quantities nominated by Buyer for that month by more than the tolerance specified in Section 5 of Article IV hereof.

3. Payment by Buyer to Seller shall be made on or before the due date. Such payment is to be sent by Buyer to Seller at the address identified in Exhibit D, or such other depository as Seller may designate from time to time in writing. When the due date falls on a weekend or holiday, Buyer shall cause such payment to be made on or before the first business day on which the designated depository is open after such due date.

4. Each party hereto shall have the right at reasonable hours to examine the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of this Contract. If any such examination reveals an inaccuracy resulting in an error in any billing theretofore made, the necessary adjustments in such billing and payments shall be promptly made. Each party shall preserve all records and charts or other similar records for a period of at least three (3) years, but neither party shall be required hereby to maintain same for any longer period.

5. If Buyer fails to make payment for the gas delivered hereunder when such payment is due, Seller may, in its discretion, in addition to any other remedies available to it by law, or pursuant to this contract, suspend or terminate deliveries of gas.

ARTICLE IX

TITLE AND LIABILITY

1. Title to all gas sold and purchased hereunder shall pass from Seller to Buyer at the point of delivery at which Seller delivers said gas to the initial receiving pipeline(s) for Buyer's account. Seller shall be deemed to be in control and possession of said gas until it shall have been delivered to the initial receiving pipeline(s) at the point(s) of delivery, after which the initial receiving pipeline(s) shall be deemed to be in control and possession of the gas hereunder until it shall have been transmitted and delivered by such pipeline(s) to another company as provided in the applicable gas transportation contract and Exhibit A. If the company to which the initial receiving pipeline delivers the gas is not Buyer, after delivery of the gas to the other company that other company shall be deemed to be in control and possession of the gas hereunder until it shall have been transmitted and delivered by such other company to another in keeping with the provisions of the applicable gas transportation contract and Exhibit A, and so on until said gas shall be delivered to Buyer's facilities identified in Exhibit B. Buyer shall have no responsibility with respect to any gas hereunder at any time

because of anything which may be done, happen, or arise with respect to said gas before it is transmitted and delivered to Buyer's facilities, other than to pay Seller for gas delivered to the initial receiving pipeline(s) pursuant hereto. It is the understanding and intent of the parties hereto that Seller will assume the full cost and expense, as well as full and complete liability and responsibility, for collecting, gathering, metering, and transporting the gas to the delivery point(s), including the full costs and expense of any compression and other facilities necessary to deliver the full volumes provided to be sold and purchased hereunder to the delivery point(s).

2. Seller will indemnify, defend and save Buyer harmless from any and all suits, actions, claims, damages, or other liabilities or costs arising out of the loss or damage to property or injury or death of any person or persons whomsoever, except for any liability for injury or death of any person or persons due to Buyer's sole negligence, occurring upstream of the delivery point(s) to the initial receiving pipeline(s) in the performance of this Contract.

3. Buyer will also indemnify, defend and save Seller harmless from any and all suits, actions, claims, damages, or costs arising out of the loss or damage to property or to any person or persons whomsoever, or arising out of the injury or death of any person or persons whomsoever, in the event that such loss, damage, injury or death shall be proximately caused by any act or omission, or any breach of any statutory duty of Buyer, or its employees or agents, occurring in the performance of this Contract.

ARTICLE X

TAXES

1. Seller shall bear the economic burden of all taxes and assessments that may be imposed with respect to the gas delivered hereunder prior to its delivery to the initial receiving pipeline(s) at the point(s) of receipt specified herein and imposed incident to the sale to Buyer or delivery of such gas to the initial receiving

pipeline for Buyer's account, and Buyer shall bear the economic burden of all taxes and assessments imposed upon Buyer with respect to the gas delivered hereunder after its receipt by the initial receiving pipeline for Buyer's account. Neither party shall be responsible for any taxes or other statutory charges levied or assessed against any of the equipment of the other party used for the purpose of carrying out the provisions of this Contract. As to taxes to be borne by Seller as above set out, but for which Buyer makes payment on Seller's behalf, Buyer may deduct such payment from amounts due Seller hereunder.

2. Buyer shall not be liable for any tax levied or assessed upon or with respect to oil, condensate, liquefiable hydrocarbons or other liquids, helium or nonhydrocarbon substances which may be extracted or separated by Seller prior to delivery of gas delivered hereunder, or upon or with respect to the process prior to delivery of extracting or separating any such products or substances from such gas or of handling, selling, transporting or otherwise dealing in or with any of such products or substances, all of which taxes shall be borne and paid solely by Seller and if paid by Buyer, may be deducted from amounts due Seller hereunder.

ARTICLE XI

WARRANTY

Seller hereby warrants title to all gas purchased hereunder and the right to sell the same, and Seller further warrants that all such gas is owned by Seller free from all liens and adverse claims, including liens to secure payment of production taxes, severance taxes, and other taxes levied on Seller or on the gas delivered hereunder. Seller at all times shall have the obligation to make settlements with all persons having any interest in the gas sold hereunder; and Seller agrees to indemnify and defend Buyer, and save it harmless from all suits, actions, debts, accounts, damages, costs, losses and expense arising out of or from adverse claims of any and all persons to said gas or to royalties, taxes, license fees, or charges thereon, or which may be levied and assessed upon the sale thereof to Buyer. In the event that a dispute develops

concerning the ownership of any gas delivered hereunder, Buyer shall have the right to withhold payment for said gas, without the payment of interest, until the dispute has been resolved, unless Seller furnishes to Buyer a bond or corporate undertaking sufficient to satisfy any adverse claims.

ARTICLE XII

NOTICES

1. Except as otherwise provided herein, any notice provided for in this Contract or any notice which Buyer or Seller may give to the other party shall be in writing. Any notice desired to be given under this Contract may be given as follows:

(i) by personally handling such notice to an officer of the receiving party or to some other responsible management employee of the receiving party; or

(ii) by prepaid registered mail to the address or addresses identified in Exhibit D.

(iii) by telex to the telex number identified in Exhibit D.

(iv) by telecopier to the telecopier number identified in Exhibit D. Such other addresses, telex number or telecopier number as a party may from time to time designated by written notice.

2. A notice delivered by hand shall be deemed to be received at the time it is delivered to an officer or to a responsible management employee of the receiving party. A notice sent by telex or telecopier shall be deemed to be received twenty-four (24) hours after such notice was sent. A notice sent by registered mail shall be deemed to be received five (5) business days after the date on which it was mailed but excluding herefrom each day during which there exists an interruption of postal service due to a strike, lockout or any other cause; provided in such event no notice may be sent by mail during the term of any such strike, lockout or such other cause constituting a mail disruption.

All routine communications between the parties, other than notices as aforesaid, may be sent by ordinary or registered mail.

ARTICLE XIII

FORCE MAJEURE

1. In the event of either party hereto being rendered unable, wholly or in part, by force majeure to carry out its obligations under this Contract, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as reasonably possible after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused. Such cause shall, as far as possible, be remedied with all reasonable dispatch.

2. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, sabotage, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, crevasses, lightning, earthquakes, fires, storm warnings, hurricanes, tornadoes, floods, washouts, impassable snow conditions, road bans, shut-downs for emergency repairs or alterations, breakage or accidents to wells, machinery or pipelines, freezing of wells or lines of pipe, arrests and restraints of governments and people, civil disturbances, explosions, and any other like causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome.

3. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the party having the difficulty.

4. Neither party shall be entitled to the benefit of the foregoing provisions of this Article XIII hereof under any of the additional circumstances:

(a) to the extent that the failure was caused by the contributory negligence of the party claiming suspension;

(b) if the failure was caused by lack of funds or with respect to the payment of any amount or amounts due hereunder.

5. As soon as practicable after the force majeure event shall have been remedied, the party claiming suspension shall likewise give notice to the effect that the same has been remedied and that such party has resumed, or is then in a position to resume, the performance of such covenants or obligations.

ARTICLE XIV

PLANT CLOSING

If Buyer elects to temporarily and/or permanently close or sell any of its industrial facilities identified in Exhibit B for business reasons, then upon 30 days prior written notice to Seller by Buyer the Maximum Daily Quantity, Maximum Monthly Quantity, and the Maximum Annual Quantity may be reduced by the amount of the said facility's forecasted quantities, for the period the facility(ies) are closed or sold, as determined by the parties. Buyer or Seller shall have the option to terminate this Contract, upon thirty days notice, in the event that Buyer elects to permanently close all of its industrial facilities identified in Exhibit B for business reasons.

ARTICLE XV

CONTINGENCY

This Contract is made with the understanding that the pipelines identified in Exhibit A, or their successors or assigns, shall, during the term hereof, enter into gas transportation contracts to transport gas on terms satisfactory to Buyer to enable Buyer to continue to transport the gas provided to be sold and purchased hereunder. Should such transportation be discontinued, this

Contract shall thereafter be of no force and effect, except to require payment then or thereafter due for gas delivered or required to be delivered by Seller thereafter hereunder.

ARTICLE XVI

TERM

Unless sooner terminated in keeping with the provisions hereof, this Contract shall commence with the date written above and shall remain in force and effect for a period of one year and month to month thereafter, provided that subject to provision of Article IV, this Contract may be terminated by either party at the end of the first year or any subsequent month hereunder if either party gives written notice of such termination at least thirty (30) days prior to the expiration of such first year or any subsequent month thereafter.

ARTICLE XVII

SUCCESSORS AND ASSIGNS

Either party may assign its interest hereunder, with consent of the other party, in writing, to an affiliate or any company which shall succeed by purchase, merger, consolidation, or other transfer of substantially all of its assets involved in this Contract. In the event of any such assignment, such successor shall be entitled to the rights and shall be subject to the obligations of its predecessor under this Contract. Otherwise, neither party shall assign this Contract without the prior written consent of the other party, which consent shall not be unreasonably withheld. In either event, the party assigning its interest shall not be released from any of its obligations by the other party unless such assignment expressly provides that assignee assumes all duties and obligations of the assigning party. Nothing herein contained shall prevent or restrict either party from pledging, granting a security interest in, or assigning as collateral all or any portion of such party's interest in this Contract to secure any debt or obligation of such party under any mortgage, deed of trust, security agreement or similar instrument.

ARTICLE XVIII

MISCELLANEOUS

1. The failure of either party hereto at any time to require performance by the other party of any provision hereof shall in no way affect the right of such party thereafter to enforce the same, nor shall the waiver by either party hereto of any breach of any provision hereof by the other party be taken or held to be a waiver by such party of any succeeding breach of such provision, or as a waiver of the provision itself.

2. In the event either Buyer or Seller shall fail to perform any of its obligations hereunder in accordance with the terms and conditions of this Contract, and if the defaulting party does not commence to remedy such failure within thirty (30) days after written notice thereof has been given by the nondefaulting party to the defaulting party, or thereafter fails to proceed diligently to remedy such failure, then this Contract and all of the provisions hereof may be terminated forthwith by the nondefaulting party by written notice to the defaulting party; provided, however, that any termination by the nondefaulting party shall be in addition to and not in lieu of any other remedy available to the nondefaulting party hereunder or any other legal or equitable remedy which may be available to the nondefaulting party and shall be without prejudice to the Seller's right to collect any amounts due from Buyer prior to the time of termination. Anything to the contrary in this Contract notwithstanding, neither Buyer or Seller shall be liable to the other for loss of profits or for any other incidental or consequential damages whatsoever.

3. If, at any time during the term of this Contract, (i) Seller's obligations under this Contract shall become subject to regulation by a state public utilities commission, the Federal Energy Regulatory Commission, Department of Energy or other governmental regulatory entity or (ii) Buyer shall be notified that proceedings will be or have been initiated to declare it a public utility or subject it to regulation by any governmental regulatory entity, then and in either of such events, the adversely affected party may elect to terminate this Contract by giving twenty-four

(24) hours' notice of such termination to the other. Such notice shall be confirmed in writing within five days of the day it is given.

4. In the event the above-mentioned gas transportation contracts are superseded by other subsequent transportation contracts, Buyer shall deliver a true copy of such subsequent transportation contract(s) to Seller who shall acknowledge receipt therefor in writing. It is agreed between the parties that the terms and provisions of said gas transportation contract or subsequent transportation contracts, as the case may be, shall to the same extent as the prior transportation contracts are applicable to the sale by Seller and purchase by Buyer of the gas herein referred to in keeping with the provisions hereof, be incorporated herein and made a part hereof by reference in the same manner as if said terms and provisions were recited herein at length.

5. The headings of various Articles of this Contract are for conveniences only and are not to be considered as interpreting any provision of this Contract.

6. This Contract sets forth all understanding between the parties respecting the subject matter hereof, and all prior contracts, understandings, and representations, whether oral or written, representing such subject matter are merged into and superseded hereby. No modification or amendment of this Contract shall be binding on either party unless in writing and signed by the party to be bound.

7. The parties hereto shall from time to time, and at all times, do all such further acts and execute and deliver all such further deeds and documents as shall be reasonably required in order to fully perform and carry out the terms of this Contract.

8. Any waivers by either party shall only be effective if in writing. No waiver by Buyer or Seller of any default by the other under this Contract shall operate as a waiver of a future default whether of a like or different character.

9. Each party's books, accounts and records respecting the sale and purchase of Gas under this Contract may be audited

within twenty-four (24) months next following the end of a Contract Year for which such sale, purchase or payment was made. Each party may conduct such audit upon reasonable notice to the other party, and the cost of such audit shall be at the auditing party's own expense. Any claim arising out of such audit must be presented by the auditing party within two (2) months of the completion of the audit. Any overage or underage shall be paid by the appropriate party within thirty (30) days after determination thereof.

10. In the event that any one or more terms or provisions of this Contract are found to be void or unenforceable for any reason, such terms and provisions shall be considered at such time to be deleted from this Contract, and this Contract shall continue in full force and effect as if such terms and provisions were never part of this Contract.

11. Whenever the singular or masculine or neuter is used in this Contract, the same shall be construed as meaning plural or feminine or body politic or corporate, and vice versa where the context or the parties hereto so require.

ARTICLE XIX

LAWS, ORDERS, RULES AND REGULATIONS

1. This Contract, and the rights and obligations of the parties, and the performance by either party of any and all of the obligations set forth in this Contract shall be subject to all valid and applicable laws, orders, rules and regulations of any duly constituted authority having jurisdiction.

2. This Contract shall be interpreted in accordance with the laws, customs and usage of the State of Indiana.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be executed as of the day and year first above written.

SELLER: MOBIL NATURAL GAS, INC.

WITNESS:

/s/ Sandra L. [illegible] By: /s/ D.R. Briggs

Its: Attorney-in-Fact

BUYER: GENERAL MOTORS CORPORATION

WITNESS:

/s/ R.J. Woebman By: /s/ R.H. [illegible]

Its: Vice President

EXHIBIT A

To Gas Purchase Agreement

GM Inquiry # 19-88

Transporting Pipelines

1. Initial Receiving Pipeline: Texas Gas Transmission Corp. (TGT)

   - Delivery by Seller to interconnect(s) identified on Exhibit A-1.

2. Delivery by No. 1 to:

   1. Indiana Gas Company (Indiana)
   2. Citizens Gas & Coke Utility (Citizens)
   3. Western Kentucky Gas Company (Western)
   4. Consolidated Gas Transmission Corp. (Consolidated)

   - Delivery by No. 1 to interconnect at:

     1. TGT and LDC's listed above
     2. TOT and Consolidated at LeBanon, Ohio

3. Delivery by No. 2 to:

   Items 1-3 to GM plants listed on Exhibit B

   Item 4 (Consolidated) to:

   1. Rochester Gas & Electric Company (Rochester)
   2. East Ohio Gas Company (East Ohio)

   - Delivery by No. 2 to interconnect at:

     LDC's listed above and GM plants

     Consolidated to:

     1. Rochester
     2. East Ohio

4. Delivery by No. 3 to Buyer's facilities identified on Exhibit B.

* *

A. Second Initial Receiving Pipleline: _____

- Delivery by Seller to interconnect(s) identified on Exhibit A-2.

B. Delivery by A to: _____

- Delivery by A to interconnect at:

_____

C. Delivery to B to:_____

- Delivery by B to interconnect at:

_____

D. Delivery by C to Buyer's facilities identified on Exhibit B.

EXHIBIT A-1

To Gas Purchase Contract

GM Inquiry # 19-88

Delivery Points Into Initial Receiving Pipeline

Number Name (Well, Processing Plant, platform etc.)	Location (Section, Twp. Range, County, State)
Interconect between Texas Gas Transmission and Consolidated Gas Transmission	LeBanon, Ohio

MOBIL NATURAL GAS INC.
~~MOBIL OIL CORPORATION~~
TEXAS GAS RECEIPT POINTS

I. DIRECT PRODUCTION:

NAME: Superior - Souh Thornwell
DESCRIPTION:
SECTION NO. 5 TOWNSHIP NO: 12 South RANGE NO.: 4 West
COUNTY/PARISH: Cameron Parish STATE: Lousisiana
TGT ZONE: 1 ONSHORE/OFFSHORE: Onshore BLOCK NO.:
PIPELINE: METER NO.: ~~693~~ 2822

EXHIBIT A-1 (Cont'd)
To Gas Purchase Contract

NAME:	Superior Pure	
DESCRIPTION:		
SECTION NO.	34 TOWNSHIP NO: 8 South	RANGE NO.: 3 East
COUNTY/PARISH:	Arcadia Parish	STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Onshore	BLOCK NO.:
PIPELINE:		METER NO: 2740
NAME:	High Island 302 "A"	
DESCRIPTION:	High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.:
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: 302 "A"
PIPELINE:		METER NO: 2858
NAME:	High Island A-334 "A"	
DESCRIPTION:	High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-334 "A"
PIPELINE:		METER NO: 2863

EXHIBIT A-1 (Cont'd)
To Gas Purchase Contract

NAME:	Block A-572 "C"	
DESCRIPTION:	On Central Platform "C" Block A-572, High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-572
PIPELINE:		METER NO:

EXHIBIT A-2

To Gas Purchase Contract

GM Inquiry # 19-88

Delivery Points Into Initial Receiving Pipeline

Number Name (Well, Processing Plant, platform etc.) Location (Section, Twp. Range, County, State)

NAME:	High Island A-573 "A"	
DESCRIPTION:	High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-573
PIPELINE:		METER NO: 2859
NAME:	High Island A-573 "B"	
DESCRIPTION:	Inlet Side of Existing Measurement Facilities on Central Production Paltform "B", High Island Area Block A-573	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-573
PIPELINE:		METER NO:

EXHIBIT A-2 (Cont'd)
To Gas Purchase Contract

NAME:	High Island A-595 "CF"	
DESCRIPTION:	High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-595
PIPELINE:		METER NO: 2542

NAME:	EGAN	
DESCRIPTION:	Interconnection with Columbia Gulf Transmission Company	
SECTION NO.	5 TOWNSHIP NO: 10 South	RANGE NO. 1 West
COUNTY/PARISH:	Acadian Parish	STATE: Lousisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Onshore	BLOCK NO.:
PIPELINE:	Columbia Gulf Transmission Company	METER NO: 9003

NAME:	EUNICE	
DESCRIPTION:	Near ANR Compressor Station	
SECTION NO.	1 TOWNSHIP NO: 7 South	RANGE NO. 2 West
COUNTY/PARISH:	Acadia Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Onshore	BLOCK NO.:
PIPELINE:	ANR	METER NO: 935

EXHIBIT A-2 (Cont'd)
To Gas Purchase Contract

NAME:	EVANGELINE	
DESCRIPTION:	Interconnection with Texas Eastern Transmission Corporation	
SECTION NO.	18 TOWNSHIP NO: 6 South	RANGE NO. 1 West
COUNTY/PARISH:	Evangeline Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Onshore	BLOCK NO.:
PIPELINE:	Texas Eastern Transmission Corporation	METER NO: 8112

EXHIBIT A-2

To Gas Purchase Contract

GM Inquiry # 19-88

Delivery Points Into Initial Receiving Pipeline

Number Name (Well, Processing Plant, platform etc.) Location (Section, Twp. Range, County, State)

NAME:	LOWRY	
DESCRIPTION:	Interconnection with Natural Gas Pipeline Co. of America	
SECTION NO.	8 TOWNSHIP NO: 12 South	RANGE NO. 4 West
COUNTY/PARISH:	Cameron Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.:
PIPELINE:	Natural Gas Pipeline Co. of America	METER NO: 9446
NAME:	MAMOU	
DESCRIPTION:	Interconnection with Transcontinental	
SECTION NO.	6 TOWNSHIP NO: 6 South	RANGE NO. 1 West
COUNTY/PARISH:	Evangeline Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.:
PIPELINE:	Transcontinental Gas Pipeline Corp.	METER NO: 8147

EXHIBIT A-2 (Cont'd)
To Gas Purchase Contract

NAME:	RITCHIE	
DESCRIPTION:	Interconnection with Transcontinental Pipeline Corp.	
SECTION NO.	14 TOWNSHIP NO: 7 South	RANGE NO. 1 West
COUNTY/PARISH:	Acadia Parish	STATE: Louisana
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.:
PIPELINE:	Transcontinental Gas Pipeline Corp.	METER NO: 8145
NAME:	TEXACO-HENRY	
DESCRIPTION:	Tailgate of Texaco-Henry Processing Plant	
SECTION NO.	21 TOWNSHIP NO: 13 South	RANGE NO. 4 East
COUNTY/PARISH:	Vermillion Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.:
PIPELINE:		METER NO: 2790

EXHIBIT A-2

To Gas Purchase Contract

GM Inquiry # 19-88

Delivery Points Into Second Initial Receiving Pipeline

Number	Name (Well, Processing Plant, platform etc.)	Location (Section, Twp. Range, County, State)

EXHIBIT B

To Gas Purchase Contract

GM Inquiry # 19-88

Buyer's Facilities

(name and street address)

1. Central Foundry Bedford (Indiana Gas)
   North Jackson Street
   Bedford, IN 47421

2. CPC Bowling Green (Western KY)
   165 & 31 W. Spur
   Bowling Green, Kentucky 42101

3. General Motors Truck & Bus Group (Indiana Gas)
   340 White river Parkway
   Indianapolis, IN 46206

4. Detroit Diesel Allison (Indiana Gas)
   Plant #3, 800 Grande Avenue
   Indianapolis, IN 46206

5. Detroit Diesel Allison (Indiana Gas)
   700 Grande Avenue
   Indianapolis, IN 46206

6. Allison Gas Turbine Operations (Indiana Gas)
   2235 South Tibbs Avenue
   Indianapolis, IN 46206

7. General Motors Corporation, Delco Products Divn. (RG&E)
   1555 Lyell Avenue
   Rochester, NY 14601

8. Rochester Products (RG&E)
   1000 Lexington Avenue
   Rochester, NY 14603

EXHIBIT B (Cont'd)
To Gas Purchase Contract

9. Packard Electric (EOG)
North River Road Plt. #9 - 14
North River Road, N.E.
Warren, OH 44483

10. Parkard Electric (EOG)
Warren Plts #1 - 5
408 Dana Street
Warren, OH 44483

GM PLANTS SERVED BY EOG

11. Parkard Electric (EOG)
Austintown Plt. #44
500 Victoria Road
Youngstown, OH 44515

12. Parkard Electric (EOG)
Austintown Plt. #43
427 Thacher Lane
Youngstown, OH 44515

13. Parkard Electric (EOG)
Hubbard Plt. #42
400 Myron Street
Hyubbard, OH 44425

14. Parkard Electric (EOG)
Rootstown Plt. #7
5245 South Prospect Street
Rootstown, OH 44272

15. Parkard Electric (EOG)
Cortland Plt. #46
1000 Fowler Street
Cortland, OH 44410

EXHIBIT B (Cont'd)
To Gas Purchase Contract

16. Parkard Electric (EOG)
Cortland Plt. #45
500 West Main Street
Cortland, OH 44410

17. Parkard Electric (EOG)
Warren Plt. #8
Griswold Street, N.E.
Warren, OH 44483

18. Parkard Electric (EOG)
Warren Plt. #41
1554 Thomas Road
Warren, OH 44484

19. Parkard Electric (EOG)
(CAC) Ridge Road Plt. #47
1330 Ridge Road
Vienna, OH 44473

20. Inland Division
Euclid Plant
2001 Euclid Avenue
Euclid, OH 44117

EXHIBIT C

To Gas Purchase Contract

GM Inquiry # 19-88

Quantity and Price

1. Maximum annual quantity under Article III: 2,760,639 MMBtu.

2. Maximum daily delivery rate under Article III: 9,200 MMBTu.

3. Maximum monthly delivery rate under Article IV:

Month	MMBtu
January	284,050
February	256,939
March	231,668
April	194,350
May	209,070
June	204,700
July	199,870
August	202,055
September	195,132
October	241,155
November	256,450
December	285,200

4. Price under Article V:

Initial receiving pipeline $1.65 sat per MMBtu frim price for 1 year.

EXHIBIT C (Cont'd)
To Gas Purchase Contract

Second inital receiving pipeline $_____ per MMBtu firm price for 1 year.

5. Term and year start at 8:00 a.m. June 1, 1988 through 7:59 a.m. May 31, 1989

EXHIBIT D

To Gas Purchase Contract

GM Inquiry # 19-88

Notices

Buyer: Payment Invoices and All Other Communications
General Motors Corporation
Energy Supply Division
1829 Hallock-Young Road
Warren, OH 44481
Attn: Operations Manager

Seller: Payment Invocies
Mobil Natural Gas, Inc.
11 Greenway Plaza
Suite 2500
Houston, TX 77016
Attn: Manager Gas Sales

All Other Communications:
Mobil Natural Gas, Inc.
11 Greenway Plaza
Suite 2500
Houston, TX 77016

[Filed Oct. 29, 1991]

STATE OF OHIO
DEPARTMENT OF TAXATION

In the matter of Sales and Use Tax
Assessment, Serial No. 91002252 S

JOURNAL ENTRY

General Motors Corporation
Central Foundry Division
East Second Street
Defiance, Ohio 43512

Direct Pay Permit No. 98-001900

(Found in the Appendix to the Petition for Certiorari at 20a-25a.)

[Filed Nov. 19, 1991]

BOARD OF TAX APPEALS
STATE OF OHIO

General Motors Corporation, General Motors Building 3044 West Grand Boulevard - TX-40 Detroit, MI 48202 Appellant,	)	
v.	)	Case No. 91-K-1558
Roger W. Tracy, Tax Commissioner of Ohio State Office Tower 30 East Broad Street - 22nd Fl. Columbus, OH 43266-003- Appellee.	)	(Ohio Use Tax) NOTICE OF APPEAL

(Found in Appendix to Respondent's Brief in Opposition at 6a-11a)

BOARD OF TAX APPEALS

STATE OF OHIO

General Motors Corporation,

Appellant,

vs. Case No. 91-K-1558
Sales and Use Tax

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

General Motors Corporation,
Packard Electric Division,

Appellant,

vs. Case No. 91-K-146

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

General Motors Corporation,

Appellant,

vs. Case No. 91-K-510

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

Wednesday, May 12, 1993

VOLUME I

[I-2] Hearing Room A
24th Floor
State Office Tower
30 East Broad Street
Columbus, Ohio 43266
Wednesday, May 12, 1993

Met, pursuant to assignment, at 1:30 o'clock p.m.

BEFORE: Bradford Arnold, Attorney-Examiner.

[I-3] APPEARANCES:

ON BEHALF OF THE APPELLANT:

John C. Duffy, Jr., Esq.
Jones, Day, Reavis and Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

ON BEHALF OF THE APPELLEE:

Lee Fisher, Esq.
Attorney General of Ohio

By: Barton Hubbard, Esq.
Assistant Attorney General
Taxation Section
State Office Tower
30 East Broad Street
6th Floor
Columbus, Ohio 43266-0410

ALSO PRESENT:

Fred DiIorio

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* * * *

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[I-9] Wednesday Afternoon Session

May 12, 1993

PROCEEDINGS

THE EXAMINER: We can go on the record.

This is a hearing before the Board of Tax Appeals, State of Ohio, relative to three appeals styled General Motors Corporation, Appellant, versus Roger W. Tracy, Tax Commissioner of Ohio, Appellee, having been assigned Board of Tax Appeals case nos. 91-K-1558, 92-K-146 and 92-K-510.

These appeals have been previously consolidated for purposes of discovery hearing.

These appeals are being heard in Hearing Room A in the offices of the Board of Tax Appeals on the 24th floor of the State Office Tower, 30 East Broad Street, Columbus, Ohio, on May 12th, 1993, at approximately 2:00 o'clock p.m., pursuant to assignment before Bradford P. Arnold, Attorney-Examiner for the Board of Tax Appeals.

Notices of appeal were filed with the Board of Tax Appeals on November 29th, 1991; January 30th, 1992, and May 19th, 1992 respectively, and were [I-10] appeals from final orders of the Tax Commissioner dated October 29th, 1991; December 30th, 1991, and March 31st, 1992 respectively.

These final orders in case nos. 91-K-1558, 92-K-146, the Tax Commissioner denied Appellant's objection to the assessment, but conditionally remitted the penalty which was imposed. With respect to case no. 92-K-510, Tax Commissioner modified the original assessment as imposed and unconditionally remitted the penalty.

Will the Appellant's representative please enter an appearance by name, mailing address and telephone number.

MR. DUFFY: John C. Duffy, Jr., Jones, Day, Reavis and Pogue, 901 Lakeside Avenue, Cleveland, Ohio 44114. Area code 216-586-7145.

THE EXAMINER: Thank you, Mr. Duffy. Will the Appellee's representative enter an appearance by name, mailing address and telephone number.

MR. HUBBARD: Good afternoon, your Honor.

Lee Fisher, Ohio Attorney General, by Barton A. Hubbard, Assistant Attorney General, for Roger W. Tracy, Tax Commissioner of Ohio. Our mailing [I-11] address is 30 East Broad Street, 16th floor, State Office Tower, Taxation Section, Columbus, Ohio 43266-0410. My telephone number is 614-466-5967.

THE EXAMINER: Thank you, Mr. Hubbard.

* * * *

[I-17] * * * *

At this time, Mr. Duffy, you may call your first witness.

* * * *

MR. DUFFY: At this time I would like to call the person who is here to respond on behalf of the subpoena that was issued to the Tax Commissioner of Ohio that was served by G.M. in these [I-18] consolidated cases. I believe that person is Mr. David W. Boeder.

(Witness sworn.)

THE EXAMINER: Mr. Duffy, you may proceed.

MR. DUFFY: Mr. Arnold, since Mr. Boeder is here as the designated representative of the Commissioner who is a party to this appeal, I request permission that you allow my testimony to take the form of cross-examination and that I be permitted to ask

him what might be otherwise characterized as leading questions if I were taking this on direct examination.

THE EXAMINER: Your request is granted. You may proceed as if on cross.

[I-19] David W. Boeder

being first duly sworn, as prescribed by law, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. DUFFY:

Q. Mr. Boeder, would you please state your full name, and would you spell your last name.

A. David Wilson Boeder, B-o-e-d-e r.

Q. Mr. Boeder, are you currently employed, and if so by whom?

A. Yes, by the Ohio Department of Taxation.

Q. And what is your current business address?

A. It's 30 East Broad Street, Columbus, Ohio.

Q. And what is your current position with the Ohio Department of Taxation?

A. I am an Assistant Administrator in the Sales and Use Tax Division.

Q. How long have you held that position?

A. Approximately three years.

Q. What are your current duties and responsibilities as Assistant Administrator of the Sales and Use Tax Division?

A. I am responsible for audit activities for the Sales and Use Tax Division throughout the state. And I also have a group of

auditors called central audit [I-20] staff which are under my supervision.

Q. Has that been the scope of your duties and your responsibilities for the approximately three-year period that you have held that position?

A. Yes.

Q. In other words, the duties and responsibilities have not varied in any material way?

A. That is correct.

Q. Beginning with your initial employment, the date of your initial employment, would you state what other positions you have held with the department; the approximate time period that you held each such position, and the duties and responsibilities associated with each position.

A. I started with the department April 5th, 1971 in the central audit staff. I was an auditor primarily auditing for consumption in large manufacturing companies and public utilities for approximately six years.

After that I was a group supervisor in the central audit staff group, but I audited primarily companies who engaged in selling at the retail level, all of whom provided services.

And in 1981, I became a supervisor of the Audit Review Section of the Sales Tax Division and held that [I-21] post for about three and a half years, until January of 1985, at which time I became supervisor in central audit staff.

I was there approximately — I still have that job, as a matter of fact. And I became Assistant Administrator about three years ago.

Q. You're here today as the designee of the Tax Commissioner of Ohio in response to a subpoena that G.M. had the Board issue and was served on the Commissioner; is that correct?

A. That's correct.

Q. Have you seen a copy of the subpoena that was actually served on the Commissioner?

A. I have seen one, yes.

Thereupon, Appellant's Exhibit No. 1 was marked for purposes of identification.

MR. DUFFY: May we go off the record for a moment, please.

THE EXAMINER: Certainly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

I will note for purposes of the record that while we were off the record, Mr. Duffy had [I-22] expressed a concern that the exhibits and transcript of this hearing today, and which will reconvene on Friday at 9:00 o'clock, be considered as exhibits in the transcript for purposes of all three case nos. 91-K-1558, 92-146 and 92-K-510.

On behalf of the Board, I will indicate that any exhibits which are marked for purposes of this hearing will be considered as exhibits in each of those cases, as will the transcript of the hearing in all three cases which is being convened today and will reconvene on Friday.

BY MR. DUFFY:

Q. Mr. Boeder, I'm going to hand you Appellant's Exhibit No. 1 and ask you if this is a copy of the subpoena that was served on the Commissioner that you stated that you previously reviewed and that you're here today in response to.

A. Yes, I think it is.

Q. Okay. Do you know whether or not the Commissioner has designated anyone other than yourself to respond to that subpoena?

A. To my knowledge, no. I am the only one.

Q. Are you aware that case no. 91-1558 involves an Ohio use tax assessment that was issued to General Motors Corporation following a consumer use tax audit [I-23] at its facility at Lordstown, Ohio for the periods of January 1, 1987 through December 31, 1989?

A. I am aware that there was an assessment. I did not look up the numbers, but yes.

Q. You are aware then at least one of the assessments involves the Lordstown facility?

A. Yes.

Q. But you don't know which one?

A. Right.

Q. If I were to ask you whether you were aware that case no. 92-146 involves an Ohio sales and use tax assessment that was issued to General Motors Corporation following a consumer use tax audit at its Packard Electric Division facility in Warren, Ohio for the period January 1, 1987 through June 30th, 1990, what is your response to that?

A. Yes, I am aware.

Q. Your are aware of that.

Are you aware that case no. 92-510 involves an Ohio sales and use tax assessment that is issued to General Motors Corporation following a consumer use tax audit at its Central Foundry Division facility in Defiance, Ohio for the period October 1, 1986 through June 30, 1990?

A. In the same sense of the first one; that is I [I-24] know an assessment was made. These were direct-pay assessments.

Q. Let me ask you this. What has been your specific involvement to date in each of these three assessments?

A. All three of the assessments are were issued by central audit staff group, and I was the supervisor of central audit staff. Based on the location you indicated, there would probably have been two or three different groups involved in this, but they were all under my general supervision.

Q. What is the central audit staff?

A. It's a unit of the sales tax division which audits larger taxpayers in the State of Ohio in terms of purchases, and it also audits larger retailers throughout the country.

Q. I take it then that the agents, after conducting an audit, prepare some type of summary for recommending a sales or use tax assessment, and it is your staff that would review that recommendation?

A. Yes.

Q. And the recommendation, if approved, would result in the issuance of these sales and/or use tax assessments?

A. That's correct.

Q. Have you had any other involvement to date in [I-25] each of these matters other than your involvement as supervisor of the central audit staff?

A. Not until the subpoena, in terms of some of the things that were discussed earlier and the remand and the terms of representing the Tax Commissioner here.

MR. HUBBARD: May we go off the record?

THE EXAMINER: Certainly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

BY MR. DUFFY:

Q. Mr. Boeder, the subpoena that you just referred to in your last response, was this the subpoena for a hearing or was it a subpoena for a different proceeding related to these cases?

A. The one you just handed me, in terms of the proceeding.

Q. You did appear at a deposition on April 8th, 1993 in these cases, didn't you, as the designee of the Tax Commissioner?

A. I did.

Q. So you had some involvement in terms of that proceeding as well?

A. Yes.

Q. Have you had any other involvement to date in [I-26] these assessments other than what you have just provided in your responses?

A. Not to my knowledge, no.

Q. Are you aware that in each of these cases the Commissioner assessed Ohio use tax on purchases of natural gas made by G.M. outside Ohio, which natural gas was subsequently used or consumed at the three facilities that I have mentioned to you previously?

A. Yes.

Q. Do you know whether all of the natural gas purchased by G.M. outside of Ohio and used or consumed at these facilities during the audit period was subject to the Ohio use tax?

A. No, it was not.

Q. What portion was not, or what was the criteria for not assessing the use tax on all of it?

A. Whether or not the natural gas was used either — whether or not it was used directly in manufacturing. If it was not, it was assessed.

Q. So there was some natural gas that was purchased outside of Ohio and used or consumed by General Motors at its Ohio facilities directly in manufacturing, processing or processing of tangible personal property for sale, and it was exempted from taxation?

A. Yes.

[I-27] Q. Go ahead.

A. Probably the majority.

Q. What sections of The Revised Code would that gas have been exempted from taxation under?

A. Under 5739.02(E)(2).

MR. HUBBARD: Can we go off the record just briefly.

THE EXAMINER: Certainly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

BY MR. DUFFY:

Q. Just as a point of clarification, Mr. Boeder, because a use tax was assessed here, there is an exemption in R.C. 5747.02(C)(2) that says that if the sale is made, if the purchases is made in Ohio, it would not be subject to the sales tax, they would not be subject to the use tax; isn't that correct?

A. I believe it's 5741. Are you talking about 5747?

Q. Did I say 47? I meant to say 5747.02(C)(2).

A. That is in the statute, yes.

Q. So that is the controlling use tax exemption then. You go to 5739.01(E)(2) to find the controlling sales tax exemption; is that correct?

A. Yes.

Q. For finding that the gas used directly in [I-28] manufacturing was not subject to tax?

A. Yes.

Q. I'm going to hand you the Statutory Transcript in case no. 92-510, and I am going to refer you to page 220 of the transcript. First of all, is page 220 a copy of one of the pages from the "Examiner remarks" prepared by the tax agent who conducted this audit?

A. Yes.

Q. And is it the policy of the department to have the tax agent prepare written remarks during the course of each audit?

A. It's required, yes.

Q. And so the examiner remarks that we find here in the Statutory Transcript beginning at page 211 are something that is required of every agent; is that right?

A. Yes, they are.

Q. Referring back to page 220 of the Statutory Transcript under the paragraph entitled "Natural gas," do you see that?

A. Yes.

Q. The tax agent indicates in his remarks that G.M. had purchased natural gas from a "broker," and that in the case of the Central Foundry Division facility that [I-29] was the subject of the audit in this particular case, that these purchases began back in November of 1988.

The agent goes on to state that he explained "this state's position" on these purchases to Mr. Moon. If you go back to page 2 of his remarks, which is found at page 212 of the Statutory Transcript, he indicates that Mr. Moon is a G.M. representative. Do you see that?

A. Yes.

Q. By the way, if I use the term "G.M." with you at any time today during this hearing, I am referring to The General Motors Corporation. Is that clear?

A. Yes.

Q. Referring you back then to page 220, after I made this introductory statement to you, what is the "state's position" regarding the natural gas purchased by G.M. that was assessed in that audit?

A. If the seller of natural gas does not own or control the facilities by which it is transported, the natural gas — that the gas is not sold by a natural gas company.

Q. How is that position communicated to tax agents?

A. It would be through the group supervisors from administration.

Q. Is there anything in writing that sets forth this [I-30] policy that the department has?

A. To my knowledge, there is nothing in writing to set forth the policy that was given to any agents.

Q. Is there anything in writing issued by the Department of Taxation to consumers or other persons who might buy natural gas that reflects this policy?

A. I am not aware of any.

Q. You talked about the position entailing ownership or control of the facilities over which the natural gas is transported by the seller. In other words, the ownership or control has to be the seller's. What do you mean by "ownership"?

A. Having the transportation facilities, the pipeline and compressor stations.

Q. How do you distinguish between control and ownership? What is the difference? Your answer was in the — I'm sorry,

your answer was in the disjunctive. What is the different between ownership and control?

A. I don't know. I don't know if you can lease it or lease pipelines or not own something and still be entitled to use it.

Q. Mr. Boeder, I'm going to hand you a journal entry that was issued by the Tax Commissioner in assessment no. 92004768U that is the subject of the appeal in case no. 91-1558. I'm not going to mark it as an exhibit [I-31] because a copy of that journal entry does appear in the Statutory Transcript at pages 1 and 2. And it's 1 and 2 as it's also attached to the notice of appeal that G.M. filed with the Board.

That entry states that G.M. has objected to the assessment of "sales tax" on purchases of natural gas during the audit period. It goes on — First of all, you agree that sales tax was not assessed here. It was use tax; isn't that correct?

A. Based on the journal entry, yes. I'd have to look at the Statutory Transcript as far as the original assessment. Yes, it was all use tax.

Q. If you go to pages 94 to 96 of the Statutory Transcript that you are holding there in case no. 91-1558, you find General Motors' petition for reassessment, don't you?

A. Yes.

Q. And if you look on page 95 at paragraph E, that document indicates that General Motors protested the assessment of use tax, not sales tax, doesn't it?

A. Yes.

* * * *

[I-34] * * * *

BY MR. DUFFY:

Q. In each of the journal entries issued by the Commissioner, the Commissioner denied G.M.'s claim of exemption from Ohio

use tax for the natural gas in issue because the vendor or seller was not "a qualified natural gas company." Is that your understanding?

A. From the journal entry here, that's what it says, yes.

Q. And do you want to review the other two journal entries before confirming whether that was the term used in each of the others?

MR. HUBBARD: Your Honor, I will stipulate to the journal entries referred to "qualified natural gas companies."

MR. DUFFY: I would like to make sure that this witness understands that that is the term that was used, not that counsel does.

THE EXAMINER: All right.

Mr. Boeder, do you need to refer to the other two Statutory Transcripts to review those final orders as well?

THE WITNESS: If I am going to say yes, I think I should.

[I-35] (Pause.)

Page 1 says — each one says "qualified natural gas company."

BY MR. DUFFY:

Q. What is meant by the term "qualified natural gas company" as used in those journal entries?

A. I assume that the writer of the journal entry means by "qualified" that the seller of the natural gas owns the transportation facilities which transport the natural gas to its customers.

Q. Why do you qualify your response by saying you assume?

A. There is no definition of qualified natural gas company that I am aware of.

Q. You would agree then that the response to this question is different from the response that you gave me during your deposition, wouldn't you?

A. I would have to look at the deposition.

Q. I am referring you to deposition pages 11 and 12. The words are a little bit different, but it's substantially the same.

My comment or question to you — really not a comment. The question goes to the fact — the difference lies in the fact that you did not indicate previously that this term is not defined anywhere.

[I-36] A. I indicated in that one that I assumed it meant — I assumed it meant natural gas; that the term meant someone who distributes the gas through its pipelines.

MR. DUFFY: Could you read back his response to my question as to what is meant by the term "qualified natural gas company"?

(Thereupon, the response was read.)

BY MR. DUFFY:

Q. Are you using the term "distribution" and "transportation" synonymously then?

A. Yes.

* * * *

[I-38] * * * *

Thereupon, Appellant's Exhibit No. 2 was marked for purposes of identification.

Q. Mr. Boeder, I've handed you what has been marked as Exhibit 2. I will tell you it's a copy of a portion of the Ohio Revised Code Section 5739.02. I have marked this as an exhibit solely because I want you to refer to the language in subdivision (B)(7) of that code section. I'm not interested in any other language in any other subdivision that might be contained in that

exhibit. Is this the version of 5739.02(B)(7) that was in effect during the audit period for these [I-39] cases?

A. Substantially, yes.

Q. What is different about it?

A. Well, I believe during the early — sometime before the end of '89, there was a term — They had artificial gas and a few other things up in the top as well.

Q. In 5739.02(B)(7) —

MR. HUBBARD: Your Honor, may we go off the record.

THE EXAMINER: Certainly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

BY MR. DUFFY:

Q. Mr. Boeder, aside from the fact that sometime during the audit period the exemption might have also included sales of artificial gas by a gas company as one of the types of transactions that would be exempt, would you agree that the statute reads essentially the same during the entire audit period —

A. Yes.

Q. — as it does in the document before you?

A. Yes.

MR. HUBBARD: May we go off the record briefly again.

[I-40] THE EXAMINER: Sure.

(Discussion off the record.)

THE EXAMINER: Back on the record.

BY MR. DUFFY:

Q. You agree, don't you, that one of the statutory requirements for natural gas to be exempt from the Ohio sales tax or the Ohio use tax is that the person who sells the natural gas be a natural gas company as that term is defined in Section 5721.01 (sic) of the Revised Code.

A. 5727.01, yes.

Q. My last question to you should have referred to Section 5727.01.

Just for clarification, you agree that one of the statutory requirements in R.C. 5739.02(B)(7) for natural gas to be exempt from Ohio sales or use tax is that a person who sells the natural gas be a "natural gas company" as that term is defined in 5727.01?

A. Yes.

Thereupon, Appellant's Exhibit No. 3 was marked for purposes of identification.

Q. I hand you what's been marked as Appellant's Exhibit 3. I have marked this exhibit because I want [I-41] you to focus on the definition of natural gas company which is found in subdivision (D)(4) of this statute.

Do you agree that that definition of a natural gas company is the same definition that was in effect during the audit periods in issue here in these appeals?

A. Yes.

Q. There may have been some changes in the numbering of the statute. In other words, it may have appeared in subdivision (D)(8) during a part of the period. Aside from the renumbering, the definition itself remains the same?

A. Yes.

Q. Is this the definition of a natural gas company that was applied here by the Commissioner to determine that Mobile Natural Gas Company was not a qualified natural gas company?

A. Yes.

Q. The Commissioner does not dispute the fact that G.M. did purchase the natural gas that has been assessed here. And by "purchase," I am using that term as you find it defined in R.C. 5741.01(D).

A. It was not.

Q. The Commissioner also agrees that G.M. used the natural gas in issue here for purposes of either [I-42] heating its facilities in Ohio or for providing some type of power or energy source for its manufacturing operation conducted at those Ohio facilities?

A. Yes. The gas was used for those two purposes.

Q. The Commissioner's basic disagreement here is that the persons from whom G.M. purchased the natural gas in issue were not "supplying" the natural gas as that term is used in 5727.01(D)(4); isn't that correct?

A. Yes.

Q. How does the Commissioner define the term "supplying" as used in a statutory definition, at least for purposes of applying the sales tax exemption contained in 5739.02(B)(7)?

A. Supplying was considered to be transporting natural gas to customers through transportation facilities of the seller.

Q. Where does the transportation have to occur; from what point to what point? Just any transportation at all will do?

A. Well, the customer was an Ohio transportation company in Ohio.

Q. How much transportation has to occur?

A. How much?

Q. Yes. Does it have to be done solely by the company?

[I-43] A. It would have to be done by the company, yes.

Q. My question was would it have to be done solely by the company, or could it be done partially by the company and partially by some other person?

A. It would have to ultimately be transported by the company.

Q. You indicated earlier that the transportation of natural gas is one of the criteria here. You're saying that supplying now involves transportation, and that the ownership or control of the transportation facilities must be the seller's. What exactly is meant by "transportation"?

A. Delivery of gas.

Q. In this case, does delivery mean to the G.M. facility where it's going to be used or consumed?

A. Yes.

Q. Is that true in all instances where the statute is applied that the gas has to be delivered by the seller to the place where it's going to be used or consumed by the consumer?

A. To be a natural gas company?

Q. Yes.

A. Yes.

Q. Are there any definitions of the words "supplying" that the Commissioner has promulgated; any [I-44] rules or regulations?

A. To my knowledge, no.

Q. If G.M. purchases natural gas from a person outside the State of Ohio and that natural gas is delivered to General Motors by the seller to someplace outside the State of Ohio. And thereafter, General Motors arranges to have it transported to its facilities in Ohio through the means of some type of transmission company and/or distribution company that operates in Ohio, is there

anyway that that gas will qualify for exemption from taxation under 5739.02(B)(7)?

A. Not under that provision, no.

Q. And is that because the seller did not distribute it or transport it to General Motors in Ohio?

A. Through its facilities, that's right.

Q. Through facilities that it owns or controls?

A. (Witness nodded.)

THE EXAMINER: Mr. Boeder, for purposes of the record, if could you indicate either yes or no.

THE WITNESS: Oh, I'm sorry. Yes.

THE EXAMINER: Thank you.

BY MR. DUFFY:

Q. Are you familiar with the exemption provision in [I-45] Section 5741.02(C)(2)?

A. Is that the section regarding sales and use if it's not taxable under sales or use taxes?

Q. Let me hand you a copy of Page's Ohio Revised Code. I'd ask you to look at Section 5741.02 and specifically the language in division (C)(2).

A. Yes.

Q. What does that statute say regarding the fact that the Ohio use tax does not apply to certain types of transactions? What type of transactions are described in division (C)(2)?

A. If the sale was not subject to tax imposed by Sections 5739.01 through 5739.31 of the Revised Code, it wouldn't be subject to use tax.

Q. Doesn't this section actually say "tangible personal property or services, the acquisition of which, if made in Ohio, would not

be subject to tax imposed by Section 5739.01 to 5737.31 of the Revised Code"?

A. Yes.

* * * *

[I-52] * * * *

BY MR. DUFFY:

Q. Mr. Boeder, you agree that General Motors purchased this gas in issue outside the State of Ohio; is that correct, under a contract with Mobile Natural Gas?

A. I have not seen the contract.

Q. What do you mean you haven't seen it? You haven't had the occasion to read it?

A. I did not read it, no.

Q. I provided your counsel with copies of all of these contracts last week. You haven't looked at any of them?

A. No.

Q. You haven't looked at the ones in the Statutory Transcript either?

A. No.

Q. Why was the assessment issued here? I am asking you that question as the supervisor of the person who made the recommendations.

A. Because the natural supplier of the gas is not considered a natural gas company in Ohio. It doesn't own transmissions, or transportation facilities through which — the pipes through which the gas is transported.

[I-53] Q. You agreed with me previously to one of my questions that this gas was purchased within the meaning of 5741.01(D), did you not?

A. Yes.

Q. But you don't know whether it was purchased in Ohio or outside of Ohio?

A. The reason I don't know that is because on all direct pay audits, we assess based on — we assessed all of the audits as use tax.

Q. That's not true here. Two of these cases involved sales tax assessments.

A. Well, the present policy is to do that. So I did not — I did not look at those. I thought the numbers that you showed me were use tax.

Q. They are.

MR. HUBBARD: Your Honor, may we go off the record briefly.

THE EXAMINER: Briefly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

THE WITNESS: Apparently it wasn't, because this sales tax is issued in some of this.

BY MR. DUFFY:

Q. So you're here as the Commissioner's witness, but you don't know — you have no information about the [I-54] nature of any of the transactions that were assessed here?

MR. HUBBARD: With respect to?

MR. DUFFY: Natural gas.

THE WITNESS: When title passes, I am not familiar with it. I did not read that information.

BY MR. DUFFY:

Q. All right. Assume that the record will reflect through the testimony of other witnesses that the gas was purchased outside of Ohio pursuant to a written contract, and that the seller transferred title and possession to General Motors at a specific place outside the State of Ohio. What if that had occurred in Ohio, would that be a sale exempt from the sales tax?

A. No, only if it were used in an exempt manner.

Q. Why wouldn't it be exempt from the sales tax?

A. Under (B)(7)?

Q. Yes.

A. Because there are gas marketers in Ohio that sell natural gas without transporting it.

Q. They transport it to the consumer at the time and place where title passes. What else is necessary for a sale other than transfer of ownership and possession?

[I-55] A. To qualify, it needs to — you have to be a natural gas company for the sale to be exempted under (B)(7).

Q. And what else is entailed other than transferring title and possession at some point?

A. If you are not a natural gas company, we pick up —

Q. I know, but a natural gas company is supplying — you said that's supplying the natural gas. If the seller transfers title of the gas and possession of the gas to the consumer at a certain point in Ohio, this sale has been consummated, hasn't it? If in fact —

A. Yes.

Q. — General Motors might cause that gas to be transported from the place where it took delivery from the seller to some other place, that somehow makes it not exempt from taxation?

A. That's not our position.

Q. What is your position?

A. Our position is that the natural gas must be sold by a natural gas company.

Q. Can an out-of-state seller of natural gas — can natural gas purchased from an out-of-state seller of natural gas and delivered to a consumer outside the State of Ohio ever qualify for exemption from the Ohio [I-56] use tax if it was stored or used by the consumer in Ohio in some other taxable manner?

A. No, it could not.

MR. HUBBARD: John, just for purposes of clarification.

MR. DUFFY: No, we are not going to do clarification on the record. We are not going to do it unless —

MR. HUBBARD: All right. You were referring to the (B)(7) exemption, right?

MR. DUFFY: Yes.

MR. HUBBARD: The question then was qualified that way?

MR. DUFFY: Yes.

Thereupon, Appellant's Exhibit No. 4 was marked for purposes of identification.

BY MR. DUFFY:

Q. Mr. Boeder, I'm going to hand you Appellant's Exhibit 4. Again I would note that it is a copy of Revised Code Section 4905.03. I am handing it to you because I am interested specifically in the definition of a natural gas company that appears in subdivision (A)(6) of that statute.

[I-57] You would agree that this definition as it begins initially is identical to the definition of a natural gas company that you find in 5727.01 of the Revised Code, and specifically I am referring to the language in 4905.03(A)(6) that defines the natural

gas company to be someone who is engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within the state. That language is the identical language in 5727.01?

A. Yes.

Q. Does the department draw any distinctions between the exemptions in 4950.03(A)(6) that are contained in there? In other words, 5749.03 states that, "The Commissioner may, upon application, relieve any producers of natural gas defined in this section as a gas company or natural gas company from compliance, so long as the producer does not engage in the distribution of natural gas to consumers."

Does the Department of Taxation or the Commissioner draw a distinction between producers used there in that definition and producers who might sell natural gas that is subject to assessment in Ohio?

A. I can't answer that yes or no.

Q. Your subpoena required that you bring with you today a list of qualified natural gas companies that [I-58] were known to the Commissioner during the years 1987 through 1991. Do you have that?

A. We have a list, yes.

* * * *

[I-66] * * * *

Q. Do you have a list showing the identity of persons who are qualified as natural gas companies during these years?

[I-67] A. We have a list of people who filed gross receipts tax for natural gas.

Q. And are those companies all considered to be qualified natural gas companies as that term was used in the journal entries?

A. To my knowledge, that would be yes.

Q. Do you have that list with you here?

A. I don't have it. It's over there.

Thereupon, Appellant's Exhibit No. 5 was marked for purposes of identification.

Q. Mr. Boeder, I'm going to hand you what's been marked as Appellant's Exhibit 5 and ask you to identify that document.

A. It is a list of companies that filed public utility excise taxes for natural gas.

Q. There is a list of names on the document that comprises two pages; is that correct?

A. Yes. Some of them are repeats.

Q. Some of them are what, please?

A. It's just 1987 all by itself, and there is 1991 through 1988.

Q. That first page contains a listing of companies [I-68] that filed gross receipts tax returns as natural gas companies only during the years 1988, 1990 and 1991 or 1990, 1991. The second page contains a list of those companies that filed gross receipts tax returns as natural gas companies for the year 1987; is that correct?

A. That's correct.

Q. And is CNG Development Company on there for any of the years?

A. Yes.

Thereupon, Appellant's Exhibit Nos. 6 and 7 were marked for purposes of identification.

Q. Mr. Boeder, I have handed you Appellant's Exhibits 6 and 7 and I'd ask if you can identify those two documents.

A. These are journal entries by the Tax Commissioner.

Q. Who is the named taxpayer on those documents?

A. CNG Development Company.

THE EXAMINER: Mr. Boeder, simply for purposes of identification for the record, could [I-69] you indicate the certificate of determination number for Appellant's Exhibit 6?

THE WITNESS: 86-04042.

THE EXAMINER: Thank you. And could you identify for the record the certificate of determination number that appears on Appellant's Exhibit 7?

THE WITNESS: 85-07372.

THE EXAMINER: Thank you, Mr. Boeder. Please excuse the interruption.

Mr. Duffy, you may proceed.

BY MR. DUFFY:

Q. Mr. Boeder, in both of these journal entries, the Commissioner notes that the taxpayer does not own or operate any transmission or transportation pipelines other than incidental supply lines for production and gathering. Yet it finds in both of the journal entries that it should be assessed as a natural gas company under 5727.38 for excise tax purposes. Therefore, at least in the case of one company, the Commissioner has made a determination on the record that owning transmission or transportation facilities isn't essential to a natural gas company.

* * * *

[I-81] * * * *

THE EXAMINER: We'll take a brief [I-82] recess. We'll reconvene at 4:25.

(Recess taken.)

THE EXAMINER: Mr. Boeder, you can come back up. Unless Mr. Duffy and Mr. Hubbard are both willing to conclude your examination.

MR. DUFFY: No. We want him back.

THE EXAMINER: Well, I tried.

(Laughter.)

MR. DUFFY: Do you have the last question that I asked him.

(Thereupon, the question was read.)

BY MR. DUFFY:

Q. Yes. Well, I guess it should read "is not essential to being categorized as a natural gas company."

A. Apparently in looking at this, the writer of this journal entry determined on what basis and made that determination.

Q. Mr. Boeder, I want to clarify something regarding the Commissioner's policy, so we understand today just exactly what your testimony has been. Do you have natural gas service at your home?

A. Yes.

Q. Do you have a line that runs from the curb or [I-83] someplace on the property, a line into your home?

A. Yes.

Q. Is that your line or does it belong to someone else?

A. The line from the street is mine up to the meter.

Q. You have talked about delivery or transportation or the distribution or transportation of the gas as being a criteria for being a natural gas company; is that correct?

A. Yes.

Q. When you talk about delivery or transportation of the gas by the seller, I take it that you are talking about a place where it is ultimately used or consumed by the consumer and not where title or possession may pass before the consumer might have it transported someplace else; is that right?

A. Yes.

Q. So in the case of General Motors Corporation, these three facilities you are talking about is some point where a local distribution line would connect up to its own lines; the lines that it owns at the plants?

A. Yes.

Q. Do you know what a pipeline company is as defined in 5727.01?

A. Yes.

* * * *

[I-84] * * * *

Q. How did you determine if you know what a pipeline company is, Mr. Boeder?

A. I reviewed your Appellant's Exhibit 3, which is Section 5727.01.

Q. Okay. If you didn't have that in front of you, would you have answered no to my question?

A. I may have been less positive about it.

Q. Okay. A pipeline company doesn't distribute or transport natural gas to the end user or consumer, does it?

A. To my knowledge, it transmits natural gas for [I-85] distribution companies among others.

Q. Then distribution companies pick up, and a distribution company is a natural gas company that actually transports it to the place where it is ultimately used by the consumer or passes to the consumer's lines at the place where it's going to be used?

A. Yes.

Thereupon, Appellant's Exhibit No. 8 was marked for purposes of identification.

Q. Mr. Boeder, I am going to hand you what's been marked as Appellant's Exhibit 8, and I would ask that you refer back to what is found at pages 168 and 169 and 170 of that document. The provisions that were stated to be from Sections 5741.30 of the Revised Code and 5747.31 of the Revised Code, and 5747.32 of the Revised Code.

In your prior deposition, I asked you about this, and you told me that you were aware that these provisions had been in House Bill 904 as originally introduced; is that correct?

A. Yes.

[I-86] Q. And you told me that you didn't personally have any involvement in drafting these sections, but someone else in the Department of Taxation did; is that right?

A. Yeah.

Q. And that person was John Schmarr?

A. If it were somebody in the Department of Taxation, it would have been John.

Q. Okay. He is no longer with the department today?

A. That's correct.

Q. You have stated something in your answer that puzzles me. Are you saying that you do not know whether anybody in the Department of Taxation actually had any involvement in this?

A. I am sure that someone in the department would have involvement in it. Whether it was all drafted in the department or outside of the department, I have no knowledge as to that.

Q. Okay. You and I agree that these particular proposed sections of the Revised Code were never enacted in House Bill 904; is that correct?

A. That's correct.

Q. I have one final question.

Could you find anything in the Statutory Transcript that would indicate whether the agent who conducted these audits ever inquired of General Motors [I-87] Corporation as to from whom they purchased the natural gas that was assessed?

A. I don't recall if it was in there. The only thing I have see are the materials since — the materials since the appeal was filed.

MR. HUBBARD: Mr. Boeder, could you speak a little louder. I can't hear you.

THE WITNESS: The only reference that I saw to it was in the material that's after the assessment, after the assessment was issued.

BY MR. DUFFY:

Q. Is it true that once the agent determined that the natural gas was not purchased in Ohio they would conclude that it couldn't qualify for exemption from sales or use tax under 5739.02(B)(7)?

A. Yes.

MR. DUFFY: I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard, any questions for the witness?

MR. HUBBARD: Yes, your Honor.

[I-88] REDIRECT EXAMINATION

BY MR. HUBBARD:

Q. With respect to that last question, Mr. Boeder, let me reask you a few questions because I am referring to this particular audit. I am referring to audit policy and application of statutes generally with respect to sellers of natural gas.

A. Yes.

Q. Okay. If title to natural — First of all, for purposes of determining what a seller of natural gas is, a natural gas company, under the sales tax exemption in 5739.02(B)(7), does it matter in what state the title passes from the seller to the consumer?

A. Whether or not title passes in this state or another state is not critical to whether or not the natural gas is taxable.

Q. Does it matter at all?

A. No.

Q. It doesn't. Okay. So in the present case, you read the auditor's remarks in the one audit; is that correct? Or at least the portions of it that Mr. Duffy has shown you?

A. Portions of it, yes.

Q. Did the agent make any statement as to whether the entities or entity that General Motors purchased [I-89] the gas from were brokers?

I refer to page 220 of the Statutory Transcript in 92-510 that Mr. Boeder was previously asked to review.

A. The remarks say from a broker.

Q. So from that, would you infer that, in fact, the agent had made a determination that the gas was purchased from a broker or brokers?

A. That's what the agent said.

Q. Would that be what you would infer also?

A. Yes.

Q. So would it be your inference that he did ascertain that the entities from which the natural gas was purchased by General Motors, he at least inquired as to the nature of the kind of entity that purchased the gas?

A. Yes.

Q. So do you wish to revise your answer where Mr. Duffy asked you the question whether, from your review of your understanding of the files, whether the agent made any inquiries to the nature or the entity of the sellers of the gas?

* * * *

[I-91] * * * *

THE WITNESS: The agents indicate that it was purchased from a broker. I know nothing else besides that.

BY MR. HUBBARD:

Q. Dave, if title to natural gas passed in Ohio from the seller to the buyer, the seller neither own nor controls the facility through which the gas is transported to the buyer, would the sale of the gas be exempt under Resided Code 5739.02(B)(7)?

A. No. If the seller of the natural gas did not own or control the transportation facilities through which the gas was routed, the natural gas would not be exempt [I-92] under the (B)(7) exemption.

* * * *

[I-93] * * * *

Q. Dave, could you define what you mean by "transportation" in the context that we have — that you have testified to?

A. Taking the gas to the customer.

Q. Okay. If the customer has his own private facilities so that the customer receives the gas at some point and then has its own lines, would delivery to the point where the customer then takes it from using his own private lines, would that constitute transportation as you're using it?

A. That would be to the customer, yes.

Q. Okay. If title to the gas passes outside the State of Ohio, but the gas is then delivered or transported in Ohio through the seller's facilities to the customer in Ohio, would that transaction be exempt under Revised Code 5739.02(B)(7)?

* * * *

[I-94] * * * *

THE WITNESS: It would be exempt.

BY MR. HUBBARD:

Q. For sales and use tax purposes, in determining whether sales of natural gas are exempt under Revised Code Section 5739.02(B)(7), what steps are taken by the agent to determine whether the criteria are met?

A. When auditing a seller, the agent would consider the representation of the seller — the representation of the seller, and would subsequently when reviewing the purchase records of the company, verify whether or not the company was or was not a natural gas company in terms of looking at their purchases.

[I-95] Most natural gas companies are required to file under the Federal Energy Regulatory Commission accounts. They may also contact our Public Utility Excise Tax Section of the Department of Taxation.

Q. With respect to consumer audits, and for the Board, could you explain what a consumer audit is versus a sales audit or a vendor audit?

A. A seller audit is primarily directed at someone who is making the retail sales and to whether or not those retail sales, the correct amount of tax has been collected on those retail sales. And if not, whether the taxpayer has proper exemption certificates. A consumer audit is primarily one of the taxpayer's consumption, tangible personal property and services and whether or not he has or she has paid the proper amount of tax on the consumption on those transactions.

Q. With respect to consumer audit, what steps would the agent take to determine whether the criteria for the exemptions are met?

A. When auditing a consumer, if it were — the agent would notice the purchase of natural gas. If they were unfamiliar with the company, the seller of the natural gas, they would contact our Public Utility Excise Tax Division, the section of the Personal Property Tax [I-96] Division, and find out if the companies were registered for Ohio tax purposes.

Q. As what?

A. As a natural gas company.

Q. If the agents were to find information contrary to the position, contrary to the filing of a company as a public utility, as a natural gas company, would they take that into account?

A. They would probably want to confer with the Public Utility Excise Tax Section and find out why or find out the reason why they were treating a transaction one way that they did and their filing status.

Q. Okay. If, in fact, let's suppose a company that's a seller of natural gas is found out by the sales and use tax auditing agents not to be under control of the facilities over which the gas is delivered to the consumer and is a marketer or a broker, would they deny the exemption to that company?

A. The (B)(7) exemption?

Q. Yes.

A. Yes.

Q. Mr. Boeder, have you ever — in your testimony, you testified you're a sales and use tax agent. Have you ever been an agent in the Public Utility Tax [I-97] Section?

A. No.

Q. How would you characterize your familiarity with public utility taxes?

A. More passing than what I would call knowledgeable.

Q. So you would not consider yourself knowledgeable in public utility taxes in general?

A. Yes.

Q. Appellant's Exhibit 5 has been identified as a list of companies that filed public utility tax returns for 1987 through 1991; is that correct?

A. Yes.

Q. Okay. Do you have any knowledge as to whether any of those particular companies, in fact, do satisfy the statutory requirements for a natural gas company as defined for public utility taxation purposes?

A. Yes. Two of them.

Q. What are those two?

A. East Ohio Gas Company, and Columbia Gas of Ohio, Inc.

Q. Are there any other companies that you know meet the statutory criteria?

A. Not for certain, no.

* * * *

[I-102] * * * *

Q. Mr. Boeder, could you state what a marketer of natural gas is? And if I may modify that to a marketer or broker of natural gas.

A. Someone who sells natural gas, but doesn't take any part in the delivery or transportation to its customers.

Q. When you say "doesn't take any part in," what are you talking about?

A. Physically transporting the gas to the customer.

Q. If an entity arranged for others to do the transportation, could they still be a marketer or a broker?

A. If they arranged for someone else to?

Q. Yeah.

A. Yes.

* * * *

[I-103] * * * *

Q. For purposes of the Tax Commissioner's application of Revised Code 5727.01(B)(7) and Section 5727.01(E)(4), is a marketer or broker of natural gas a "natural gas company" within the meaning of Revised Code 5727.01(E)(4)?

A. No. We don't consider a marketer of natural gas who does not own or control the transportation facilities to transport natural gas to its customers to be a natural gas company. The sale of its gas is not [I-104] exempt under 5739.02.

Q. I can't recall if I asked this question because we had an objection, so I am going to ask it again.

If title to the natural gas passes outside the State of Ohio and then the gas is transported, delivered to Ohio customers within Ohio through trans — through facilities owned or controlled by the seller, would that transaction be exempt under 5739.02(B)(7)?

A. Yes.

Q. Do you know of any situation where the Department of Taxation has determined that a marketer or broker of natural gas did not qualify as a natural gas company so that its sales to Ohio consumers did not qualify for the exemption contained in Revised Code 5739.02(B)(7)?

* * * *

[I-105] * * * *

THE WITNESS: I am aware of at least three situations where we have considered a marketer of natural gas to be selling tangible personal property that's not exempt under (B)(7).

* * * *

[I-108] * * * *

Q. Has the department consistently applied the application of the statute that you have testified to concerning marketers or brokers of natural gas who make sales to Ohio consumers?

A. Yes. Both from the perspective of the marketer, seller as well as auditing consumers.

Q. By that you're referring to the — by "consumers," you're referring to the entities that purchase the gas from the marketers to brokers, correct?

A. Yes. They're companies who purchase such gas from companies that do not have status in Ohio as far [I-109] as the seller is concerned.

Q. By "status," you're referring to nexus contacts with the state so we can impose —

A. Yes.

Q. The Tax Commissioner can impose the obligation upon the seller —

MR. DUFFY: I'm going to object.

BY MR. HUBBARD:

Q. — to collect the tax?

A. Yes.

THE EXAMINER: Mr. Hubbard, if you would like to rephrase that to avoid the leading question.

MR. HUBBARD: I am just trying to — he is not an attorney. Instead of nexus, he used status.

THE EXAMINER: If you can ask the witness simply what he means by "status."

THE WITNESS: I mean that's — I didn't want to use the word nexus. It's the nexus which says we would not have the authority to make an assessment against the company.

BY MR. HUBBARD:

Q. With respect to purchases and sales of natural gas, are there instances when you would assess a seller [I-110] and in other instances when you would assess the consumer?

A. Yes.

Q. Could you state for the Board those situations where you would assess the consumer?

* * * *

[I-111] * * * *

THE WITNESS: As stated, there are certain taxpayers in the state that have direct-pay authority. They do not pay tax to their suppliers. They make a determination after the purchase as to whether that purchase is taxable or not.

There are also consumers who indicate to the seller that their purchases are not something to tax. They provide the exemption certificate. So the seller is not responsible for collecting tax in that case, and we would go after the consumer if it were a taxable use.

BY MR. HUBBARD:

Q. And I believe you also already testified to the situation where the seller is outside the State of Ohio and there is a sufficient nexus?

A. Right.

Q. And in that situation, you would assess the consumer?

A. Yes.

MR. HUBBARD: Counsel for Appellant, Mr. Duffy, has provided him with copies of [I-112] contracts that I believe he will have testimony on between General Motors and the seller of the natural gas.

One of those entities is an entity by the name of Yankee Resources, now known as Access Energy. So I would like to ask the witness a specific question about Access Energy and whether we have had any sales and use tax assessments arising from sales of or purchases or sales by or purchases from Access Energy.

MR. DUFFY: I'm going to object. I have asked this witness if there is anything in the record that shows who the seller of the natural gas was and he couldn't point to anything. So the Commissioner was implying about facts that aren't in evidence yet in this case.

MR. HUBBARD: Your Honor, it's not that they are not in evidence yet, but we have the contracts and Mr. Duffy has provided me with them, so that they come from the Appellant. I have no reason to believe, unless he is saying now that those weren't — that General Motors didn't have contracts with Access Energy or Yankee Resources, the name was changed during the audit period.

MR. DUFFY: No, we aren't saying that. I am just pointing out the fact for the record [I-113] that at no time did any of these agents ever ask to see who we bought the gas from. We are going to get into this on some of Mr. Boeder because you have gone through a whole list of criteria here about what agents do to

determine whether or not gas is taxable. I want to find out from this witness just exactly what agents inquired of what companies.

BY MR. HUBBARD:

Q. Mr. Boeder, if a particular taxpayer doesn't — First of all, what is the Tax Commissioner's position as to who has the affirmative burden of proof of establishing entitlement to the exemption set forth in Revised Code Section 5739.02(B)(7)?

A. The taxpayer.

Q. If the taxpayer doesn't provide the names of the sellers, would that be part of their failure to affirmatively meet their burden of proof?

A. Yes. To the agent, yes.

THE EXAMINER: Excuse me, Mr. Boeder. Could you speak up just a little?

THE WITNESS: Yes.

BY MR. HUBBARD:

Q. In this case, do you know one way or the other whether the names of the sellers were provided to the agents?

[I-114] A. I do not.

Q. We return to my question regarding Access Energy. Do you have knowledge of sales and use tax assessments that have been issued with respect to sales by and purchases from Yankee Resources, Inc. or Access Energy?

* * * *

[I-115] * * * *

THE EXAMINER: I will overrule the objection and allow the witness to testify subject to subsequent — at this point there's been no testimony [I-116] that there have been any purchases by the Appellant from either Yankee Resources or Access Energy. However, I will allow the testimony subject to that qualification.

THE WITNESS: Would you repeat the question, please.

MR. HUBBARD: Could the court reporter read my question.

(Thereupon, the question was read.)

THE WITNESS: Yes. Is that sufficient, or do you want me to expound?

BY MR. HUBBARD:

Q. Could you give some general explanation as to the circumstances? Did they include both sales audits and purchase audits?

A. My personal knowledge was involving the sales audits.

Q. Do you also have knowledge in the ordinary course of your employment with respect to what your division does?

A. I wouldn't know of any. I know that natural gas is picked up on consumers. Whether or not as Access Energy was supplying in that particular case, that I don't know.

Q. Okay.

[I-117] A. But the seller of natural gas was examined.

Q. So what you're saying is Yankee Resources, Inc. and/or Access Energy was assessed as a seller of natural gas?

A. Access Energy was, yes.

Q. And that was on their sales of natural gas to Ohio consumers?

A. That's correct.

Q. And on what basis did the Tax Commissioner assess them?

A. For failure to collect tax on transfer of tangible personal property and failure to support that with either an exemption certificate or a valid letter of usage.

Q. Was there a determination made as to entitlement to any exemption under Section 5739.02 (B)(7)?

MR. DUFFY: I'm going to object unless the witness establishes that he is talking about all out-of-state sales as opposed to in-state sales.

BY MR. HUBBARD:

Q. Regardless of whether title passes in-state or out-of-state, would it make any difference? Did it make any difference in that particular audit?

A. No.

Q. So in other words, regardless of whether the [I-118] title passed in Ohio or passed say in Texas from Access Energy to the consumer, the tax was imposed?

A. Yes.

Q. In both situations?

A. Yes.

Q. Did you answer the question with respect to whether there was a determination made as to whether Access Energy was entitled to the exemption under 5739.02(B)(7)? If not, I am asking the question again.

A. We did not exempt any of their sales under that exemption.

Q. And why didn't you?

A. Because we didn't consider them to be a natural gas company.

Q. And why was that?

A. Because they did not transport natural gas through their transportation facilities to their customers in Ohio.

Q. That is they didn't deliver it to the Ohio company; is that right?

MR. DUFFY: Objection.

THE EXAMINER: Mr. Hubbard, if you can refrain from leading the witness.

MR. HUBBARD: Okay.

BY MR. HUBBARD:

[I-119] Q. As you have defined the term "marketer," or "broker" of natural gas, would Access Energy fit that category —

A. Yes.

Q. — determined by the Tax Commissioner?

A. They were considered a marketer or broker, yes.

MR. HUBBARD: I have no further questions at this time, your Honor.

THE EXAMINER: Thank you, Mr. Hubbard.

Mr. Duffy.

RECROSS-EXAMINATION

BY MR. DUFFY:

Q. Mr. Boeder, just a few questions.

When you were referring to the Statutory Transcript, page 220, you were talking about the agent's remarks there and how he characterized the purchases as being from a broker.

Those remarks only apply to one of the three assessment, don't they?

A. That was what I was referring to, yes. I did not look at the other two in terms of how the others were characterized. The one I was looking at was the one referring to Central Foundry Division.

[I-120] Q. Do you know who the companies are that were characterized as brokers in that remark?

A. Neither the remarks nor the sheet on which the assessment was made indicate who they are.

Q. During your testimony today, you have referred to the transportation of natural gas and transportation facilities. In your deposition, you agreed with me that the term "supplying" as used in 5727.01(D)(4) was synonymous with the term "distribution." If a company was not distributing natural gas or did not have a distribution facility in Ohio, it was not a natural gas company. Today you have been very careful only to use the terms "transporting" and "transportation," not distribution.

Are you somehow making a distinction now that someone who does not own a distribution facility or does not distribute natural gas is different from someone who doesn't have transportation facilities or does not transport natural gas?

A. I guess transporting seem to be a better term.

Q. Okay. But you are not specifically omitting any reference to the phrase "distribution" because Section 4905.03 of the Revised Code in defining natural gas companies talks about those companies being relieved [I-121] from certain obligations and compliance with statutory requirements of the public utility laws. They don't engage in the distribution of natural gas.

A. That was not my intention, no.

Q. You indicated that one of the steps that an agent would do in a consumer use tax audit would be to identify who the sellers of the natural gas were that sold the gas to the consumer and contact the Public Utilities Section to find out whether those sellers were filing gross receipts tax returns in Ohio. Was that done in these three cases?

A. It does not appear to be on the one that I am looking at.

Q. Do you know if it was done in the other two cases?

A. I cannot tell without looking.

Q. Okay. Do you want to look and tell me whether you can determined whether it was done?

A. (Witness complies.)

In the one involving Packard Electric, there is no specific reference to any particular supplier.

(Pause.)

MR. HUBBARD: If Mr. Boeder could identify the pages of the Statutory Transcript he is referring to. In B.T.A. case no. 92-E-1558, the [I-122] compliance letters prior to that are at 110 of that Statutory Transcript.

MR. DUFFY: I'm not limiting the agent to any particular pages in the transcript. I am asking him to look at the entire transcript.

MR. HUBBARD: Well, that's where the —

THE EXAMINER: You can clarify that if you would like.

MR. HUBBARD: I am assisting the witness. Reference has been made to the Commissioner's remarks, and in these —

MR. DUFFY: No, it wasn't. My question didn't go to the Commissioner's remarks. It was as to whether or not the criteria that he listed for doing a consumer's use tax audit were applied or one criteria was to identify who the suppliers of the natural gas were as he characterized it, and find out whether or not they filed gross receipts tax returns with the Public Utilities Commission. I'm trying to determine whether that policy was carried out here in these three audits.

MR. HUBBARD: Well, what he's testified to is if he had the name of it, then he would consult with them. To the extent the company doesn't [I-123] provide the names, obviously he can't do that.

MR. DUFFY: He just said the policy was to determine who the suppliers were and then make the inquiry. I am asking him about whether that policy was carried out here.

THE EXAMINER: Mr. Duffy simply referred Mr. Boeder to the entire transcript in all three appeals. If you, Mr. Hubbard, feel it's necessary to direct Mr. Boeder's attention on your examination to specific pages, you may do so.

MR. DUFFY: The only reason I did is he said he could not tell whether the policy — He said the policy was not that no inquiry was apparently made. He cannot find any evidence in the Statutory Transcript in 91-1558.

MR. HUBBARD: No, that's not what he says.

MR. DUFFY: Exhibit B, 92-510. This was done.

MR. HUBBARD: Other than the preference to brokers.

MR. DUFFY: The question was, Bart, whether or not the agents actually called up the Public Utility Tax Division and asked whether any of these companies that General Motors purchased natural [I-124] gas from were filing gross receipts tax returns with the State of Ohio. He is saying that that policy wasn't implemented or that was not done in the case of 92-510.

MR. HUBBARD: Well, if the company itself is not contesting that fact, then they don't necessarily — they are saying they are outside brokers that don't file. Why would you call to confirm that?

THE EXAMINER: Mr. Duffy, you have given the witness an opportunity to review the Statutory Transcript to respond to your question. At this point, there is no objection. You're asking him simply to respond to the question. Within your examination, Mr. Hubbard, you can clarify.

MR. HUBBARD: Okay.

THE WITNESS: Do you want me to read this whole thing?

THE EXAMINER: Mr. Duffy.

BY MR. DUFFY:

Q. You said you would not be able to tell me whether or not the policy was carried out in the other two audits without reviewing the entire — without looking through the transcript. I said would you do that.

I didn't open up the question of what the audit policy was; counsel for the Commissioner did.

[I-125] I would like to know whether the policies that are supposed to be implemented regarding the consumer's use tax audit on purchases of natural gas were applied here.

MR. HUBBARD: I wouldn't characterize it as a policy. That's not the way it was characterized. There are steps that are maybe taken on an audit. There is no formal policy that's set forth. Every agent has his own way of doing something. These are steps that may be taken.

(Pause.)

THE WITNESS: Based on my review of the remarks, I do not believe the Public Utility Tax Section was consulted.

BY MR. DUFFY:

* * * *

[I-127] * * * *

Q. Mr. Boeder, you provided a list of companies that filed excise tax returns as public utilities during the years '87 through '91 as natural gas companies, and it has been marked as Exhibit 5; is that correct?

A. Yes.

Q. Do you have any information today that there were any companies on that list that filed returns for any years that should not have because they weren't natural gas companies?

[I-128] A. I do not have that information, no.

Q. Okay. Are you here testifying that that list contains companies that did file returns as natural gas companies when they shouldn't have?

A. I have no personal knowledge of that.

Q. Okay. Does the Department of Taxation, actually during the course of an audit of a company for gross receipts tax purposes, determine whether that company should be filing returns as a natural gas company?

A. I can't answer that question.

Q. All right. How about when companies file corporate franchise tax returns. Do you have any knowledge whether the department audits the persons who filed those returns to determine whether or not they should even be filing gross receipts tax returns as a public utility rather than a corporate franchise tax return as a general business?

A. I have no knowledge of that either.

MR. DUFFY: Okay. I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy.

Mr. Hubbard, any further questions of Mr. Boeder?

MR. HUBBARD: Yes, your Honor.

[I-129] FURTHER REDIRECT EXAMINATION

BY MR. HUBBARD:

Q. Dave, just briefly. Could you tell the Board what your educational background is?

A. Starting when?

MR. DUFFY: I don't have any objection.

BY MR. HUBBARD:

Q. College.

A. I went to Ohio State from 1965. I went one year to Wisconsin State University, Eau Clair, and then three years at Ohio State University. I have a B.S. in Finance, and a Master's Degree in Business Administration from Ohio State.

Q. Do you have any professional certifications?

A. No.

Q. I'd like to refer your attention to the audit remarks in 92-146 and specifically to page 154.

MR. DUFFY: If you're going to do that, I would like my copies back. You can give him yours.

BY MR. HUBBARD:

Q. I direct your attention specifically to the last sentence prior to the summary. Could you read that please for the record.

[I-130] A. "Tax due on natural gas purchases from non public utility suppliers was then computed and listed with tax due on assets for the audit period."

Q. Does that indicate to you that the agent made some inquiry with respect to the nature of the seller of the natural gas?

* * * *

[I-131] * * * *

THE WITNESS: The agent indicates that the natural gas was not purchased from a public utility.

* * * *

Q. Let me ask you this question. In your experience, do agents put things in the remarks that they don't know are true and just speculate without any concrete basis?

* * * *

[I-132] * * * *

THE WITNESS: Typically the agent would find out from whom things are purchased.

BY MR. HUBBARD:

Q. So your answer is that the agent — The specific question was, in making factual statements in a case, will an agent have some factual basis for those statements? What is your answer to that?

* * * *

[I-133] * * * *

THE WITNESS: Yes.

Q. Who is the agent in that case?

A. Mr. Lawrence.

Q. Do you generally find him to be objective and to have a factual basis for the statements he makes in his remarks?

A. Mr. Lawrence is not one of my agents. He is an agent from the Youngstown district.

Q. Are you familiar with Mr. Lawrence?

A. Remotely.

Q. So your answer is no. You don't have any basis for saying one way or the other.

I am going to show you another Statutory Transcript. You don't have an opinion of Mr. Lawrence? You don't have enough of a basis?

A. I do not know Mr. Lawrence.

Q. Okay. Do you know his supervisor?

A. His supervisor on this audit was Gerald Sinkovich.

Q. Do you have an opinion as to — do you have personal knowledge as to his review?

[I-134] A. Yes.

MR. DUFFY: Objection. Mr. Sinkovich didn't write the remarks.

BY MR. HUBBARD:

Q. Did Mr. Sinkovich review those remarks?

A. Yes.

Q. Is it your understanding, your familiarity with his work, that he would insist upon a factual basis for his agents' statement in the remarks?

A. Yes.

Q. I'd like to refer your attention to the audit remarks, examiner's remarks in case no. 91-E-1558. Specifically to page 111 of those remarks. I'd like you to read the first sentence under the category "Type of records" for the record, please.

A. "The records made available and examined by the agent included invoices from brokered natural gas purchases."

Q. Is there reference to brokered natural gas purchases to purchases made by General Motors from brokers of natural gas?

A. That's what it says, yes.

Q. Are you familiar with the agent in this case?

A. Yes.

Q. Who is it?

[I-135] A. Bruce Steiner.

Q. Is he supervised by you or was he at the time?

A. Ultimately, but Gerald Sinkovich is his supervisor.

Q. And with respect to statements made in audit remarks by Mr. Steiner, would he, in your experience, have a factual basis for making those statements?

A. Mr. Steiner is very dependable, yes.

Q. So you personally know of Mr. Steiner's work, and you personally state that he would be very reliable?

A. He is a good agent, yes.

Q. If a taxpayer/consumer itself described the transaction where gas was purchase from a broker, would the agents necessarily check with the Public Utilities Tax Division of the Department of Taxation to ascertain whether that entity was filing public utility tax returns?

A. Probably not.

Q. Why is that?

A. Because the taxpayer said that they bought it through a marketer or seller of natural gas.

Q. Do you have any reason to know one way or another whether that's what occurred in this case?

A. I don't have particular knowledge as to what occurred. No.

[I-136] Q. Okay.

A. In terms of whether the agent or agents consulted the PUCO or Public Utilities Tax Division or not.

MR. HUBBARD: Your Honor, I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Hubbard.

Mr. Duffy, anything further.

FURTHER RECROSS-EXAMINATION

BY MR. DUFFY:

Q. One question.

With regard to the remarks on page 154 of the transcript in case no. 92-146, what is the difference between a non public utility supplier of natural gas and a public utility supplier of natural gas?

A. I don't know what his meaning of the term is in this case. I don't want to speculate.

Q. The term "public utility" isn't used at all in 5739.02,(B)(7), is it?

A. No. Natural goes company is referred to.

MR. DUFFY: Thank you. Nothing further.

THE EXAMINER: Even though you asked two questions, Mr. Duffy.

[I-137] (Laughter.)

Mr. Hubbard, anything further?

MR. HUBBARD: No, your honor.

THE EXAMINER: Okay. Thank you, Mr. Hubbard.

Mr. Boeder, you may step down. Thank you very much.

He was concerned, Mr. Hubbard, you were going to say you had one more question.

(Laughter.)

MR. DUFFY: I would move at this time for the admission of Appellant's Exhibits 1 through 8 into the record.

* * * *

[I-144] * * * *

THE EXAMINER: If I may save the parties some time. I will overrule the objections. Counsel has noted for the Appellant, however, in examination of the witness that certain of Appellant's Exhibits 2 through 4 do not accurately reflect the statute

provisions that were in effect throughout the entire audit period involved in all three of these appeals.

However, subject to that limitation, the documents will be admitted into evidence and received and considered for what weight this Board may deem to [I-145] afford them.

However, the Board will certainly not be bound in its decision by copies of the Revised Code that may have been altered throughout the audit period.

Thereupon, Appellant's Exhibit Nos. 1 through 4 were received into evidence and made a part of the record herein.

THE EXAMINER: Appellant's Exhibit No. 5; Mr. Hubbard, do you have an objection?

MR. HUBBARD: We certainly do, your Honor. That exhibit is the subject of our motion to quash and the memorandum in support.

We obviously renew our objection on the bases stated in the written memorandum in support and any additional bases we may have stated today.

I have nothing further to add from what we already stated on that point.

THE EXAMINER: Thank you, Mr. Hubbard.

Based upon my prior ruling with regard to the motion to quash that has been filed with this Board on May 11th and my ruling that I made at the time testimony was elicited, I will overrule the objection [I-146] and admit Appellant's Exhibit 5 into evidence.

Thereupon, Appellant's Exhibit No. 5 was received into evidence and made a part of the record herein.

THE EXAMINER: Appellant's Exhibits 6, 7 and 8. Nos. 6 and 7, which certificates of determination of the Tax Commissioner. Mr. Hubbard, do you have any objections to them being received into evidence?

* * * *

[I-147] * * * *

THE EXAMINER: To some degree, Mr. Hubbard's objection does go to the weight which this Board should accord to the testimony of the witness who identified Appellant' Exhibits 6 and 7. To that extent the objection is overruled.

With respect to their relevance to this case, as Appellant's counsel pointed out, they are certainly relevant to the position that Appellant is presenting on appeal. I will overrule the objection and allow them to be received into evidence.

Again, these documents will be subject to what weight the Board may deem to accord them.

[I-148] Thereupon, Appellant's Exhibits Nos. 6 and 7 were received into evidence and made a part of the record herein.

THE EXAMINER: Finally, Appellant's Exhibit No. 8 which is House Bill No. 904, Mr. Hubbard.

* * * *

[I-149] * * * *

THE EXAMINER: It's my recollection of the witness' testimony that he was certain that the department or someone from the Department of Taxation had some input, but he could not testify with certainty as to who such individual might be.

I personally do not particularly find this document to have much relevance in this case. However, the Board may disagree with me on that. Therefore, I will overrule the objection and allow it to be received into evidence, subject to the Board's determination, as with the rest of my rulings; that they may find it to be irrelevant and determine that it should be excluded. However, it will be received into evidence.

Thereupon, Appellant's Exhibits No. 8 was received into evidence and made a part of the record herein.

[I-150] THE EXAMINER: Is there anything further at this point prior to our recessing until Friday morning at 9:00 o'clock?

MR. DUFFY: I have nothing.

MR. HUBBARD: No, your honor.

THE EXAMINER: All right.

This Board stands in recess until Friday, May 14th, 1993 at 9:00 o'clock a.m.

Thereupon, the hearing recessed at 6:15 o'clock p.m. on Wednesday, May 12, 1993 to reconvene on Friday, May 14, 1993 at 9:00 a.m.

[II-1] BOARD OF TAX APPEALS

STATE OF OHIO

General Motors Corporation,

Appellant,

vs. Case No. 91-K-1558
Sales and Use Tax

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

General Motors Corporation,
Packard Electric Division,

Appellant,

vs. Case No. 91-K-146

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

General Motors Corporation,

Appellant,

vs. Case No. 91-K-510

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

Friday, May 14, 1993

VOLUME II

[II-2] Hearing Room A
24th Floor
State Office Tower
30 East Broad Street
Columbus, Ohio 43266
Friday, May 14, 1993

Met, pursuant to assignment, at 9:00 o'clock a.m.

BEFORE: Bradford Arnold, Attorney-Examiner.

[II-3] APPEARANCES:

ON BEHALF OF THE APPELLANT:

John C. Duffy, Jr., Esq.
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ON BEHALF OF THE APPELLEE:

Lee Fisher, Esq.
Attorney General of Ohio

By: Barton Hubbard, Esq.
Assistant Attorney General
Taxation Section
State Office Tower
30 East Broad Street
16th Floor
Columbus, Ohio 43266-0410

ALSO PRESENT: Fred DiIorio
Marilyn A. Wethekam
Paul Ritter

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* * * *

[II-9] Friday Morning Session

May 14, 1993

PROCEEDINGS

Thereupon, Appellant's Exhibit Nos. 9 through 25 were marked for purposes of identification.

THE EXAMINER: We can go on the record.

This is a hearing before the Board of Tax Appeals, State of Ohio, relative to three appeals styled General Motors Corporation, Appellant, versus Roger W. Tracy, Tax Commissioner of Ohio, Appellee having been assigned Board of Tax Appeals case nos. 91-K-1558, 92-K-146 and 92-K-510.

We are reconvening this hearing from a prior date of May 12th, 1993, in Hearing Room A in the offices of the Board of Tax Appeals on the 24th floor of the State Office Tower, 30 East Broad Street, Columbus, Ohio, on May 14th, 1993, at approximately 9:25 a.m., pursuadeponnt to assignment before Bradford P. Arnold, Attorney-Examiner for the Board of Tax Appeals.

For purposes of the record, I will ask at [10] this time that Appellant's representative enter his appearance.

MR. DUFFY: John C. Duffy, Jr., Jones, Day, Reavis and Pogue, North Point, 901 Lakeside Avenue, Cleveland, Ohio, 44114, telephone number 216-586-7145.

THE EXAMINER: Thank you, Mr. Duffy.

Will Appellee's representative please enter an appearance for purposes of the record.

MR. HUBBARD: Good morning, your Honor. Lee Fisher, Ohio Attorney General, by Barton A. Hubbard, Assistant Attorney General, for Roger Tracy, Tax Commissioner of Ohio.

My mailing address is 30 East Broad Street, 16th floor, State Office Tower, Taxation Section, Columbus, Ohio 43266-410. My telephone number is 614-466-5967.

THE EXAMINER: Thank you, Mr. Hubbard.

* * * *

[II-15] * * * *

MR. DUFFY: No. Mr. Freeman is the first witness.

THE EXAMINER: That's fine.

(Witness sworn.)

[II-16] Steven C. Freeman

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUFFY:

Q. Mr. Freeman, would you please state your full name for the record.

A. Steven Craig Freeman.

Q. Mr. Freeman, are you currently employed, and if so by whom are you employed?

A. Yes, I am employed by Mobile Natural Gas, Incorporated.

Q. And how long have you been employed by Mobile Natural Gas, Incorporated?

A. I have been employed by Mobile Natural Gas, Incorporated since mid '87 when that corporate entity was established. Prior to that time, I was employed by Mobile Oil Corporation.

Q. What is the relationship, if any, between Mobile Natural Gas, Incorporated and Mobile Oil Corporation?

A. Mobile Natural Gas, Incorporated is a wholly-owned subsidiary of Mobile Oil Corporation.

Q. What is your current position with Mobile Natural Gas, Incorporated?

A. Manager of long-term sales.

[II-17] Q. And what is your current business address?

A. 12450 Greenspoint Drive, Houston Texas.

Q. Would you briefly describe the business engaged in by Mobile Natural Gas, Incorporated?

A. Mobile National Gas, Incorporated is in the business of purchasing from other affiliated Mobile companies and other third-party producers purchasing natural gas and marketing that to our portfolio of customers.

We are able to do this because of changes in regulations. Prior to mid '86, it was the only possible sale that a producer such as Mobile could make would be to an interstate pipeline company. We are now able to — because of changes in the regulations, we are able to market directly to end users, local distribution companies, industrial companies. Mobile decided to get into that business in mid '86.

Q. Is the business of Mobile Natural Gas, Inc. which you have just described any different than it was during the period of time 1987 through 1990 in any significant way?

A. It's the same basic business that we are involved in today.

Q. What are your duties and responsibilities as a manager of long-term sales for Mobile Natural Gas, [II-18] Inc.?

A. I am manager of the long-term sales group. We are charged with the responsibility of selling gas under contracts of a term of longer than one month.

We do this by contacting our customers, our potential customers and determining what it is that they are — what it is that they are needing; what their wants and desires are; submitting proposals to fill those needs; negotiating contracts. When we are successful with those proposals, we administer the sales that occur under those contracts.

Q. Who oversees that operation within the company?

A. I oversee the long-term sales effort.

Q. What is your educational background?

A. I have a Bachelor of Science Degree in Mechanical Engineering from Bucknell University in Lewisburg, Pennsylvania.

Q. Beginning with the date of your initial employment with Mobile Oil Corporation and coming forward, would you please state what positions you held with that company and Mobile Natural Gas, Inc., the period of time that you held each position, and the duties and responsibilities associated with each position?

A. I accepted a position with Mobile Oil Corporation [II-19] upon graduation from college. That position was Junior Marketing Representative. From the period of 1967 to 1968, I was a trainee in the sales department. Our activities consisted of selling commercial and industrial fuels and lubricants to commercial customers.

From the period of 1968 to 1970, I served in the U.S. Army, came back with Mobile.

The period of time from 1970 to 1972, I was a Commercial Marketing Representative, selling commercial and industrial fuels and lubricants to our commercial industrial customers.

The period 1972 through '78 I was a commercial lubrication engineer that provided technical lubrication support to our commercial marketing representatives.

From the period of 1979 through '80, I was involved in the marketing and technical support for our asphalt sales out of Mobile's Augusta, Kansas refinery.

From 1980 to '81, I was chief engineer of the Houston Commercial Division, supervising a number of lubrication engineers that were providing technical support to the Houston Commercial Division's marketing representatives.

MR. HUBBARD: Your Honor, I appreciate that we want to do this quickly, but is the [II-20] witness referring to any documentation? It appears he may be.

* * * *

[II-21] * * * *

THE EXAMINER: May I see the document, please. Please let the record reflect the document to which the witness was referring to for purposes of his testimony includes the dates and the [II-22] positions held and the title of the position. As Mr. Hubbard has noted, this document does not include descriptions.

MR. HUBBARD: That's fine.

THE WITNESS: The period 1981 to 1986, I was industry manager for petroleum coke and had the responsibility for marketing all of Mobile Petroleum's coke production in the United States.

In 1986, I came to Houston, Texas and was one of the initial individuals to enter into the direct marketing of natural gas. I was a sales representative in the '86 to '88 period of time and have been a manager in that organization from '88 to present.

BY MR. DUFFY:

Q. Thank you.

Mr. Freeman, one of the issues in these consolidated appeals involves the assessment of Ohio use tax on natural gas purchased by General Motors Corporation during the period October 1, 1986 through June 30, 1990. Excuse me, December 31, 1990. I may hereinafter refer to that as the audit period.

This gas was purchased by G.M. for use at three of its facilities in Ohio that have been attested to here as the Lordstown, Ohio plant, the Defiance Central Foundry plant and the Packard Electric plant in Warren, [II-23] Ohio.

Would you state whether or not you're familiar personally with any transaction between Mobile Natural Gas and/or any other Mobile affiliates in G.M. during this audit period involving purchases of natural gas, and if you would, explain how you happen to be familiar with those transactions.

A. I am familiar with several contracts during that period of time under which Mobile sold gas to General Motors for use in those plants.

I was involved in the discussion of the business arrangements; what the customer wanted and how we could provide that. I was responsible for negotiating the contracts from those agreements and administering the sales that occurred under those contracts.

* * * *

Q. When you refer to "Mobile" in your testimony, who are you referring to?

A. Mobile Oil Corporation and Mobile Natural Gas.

[II-24] Q. Okay. Because there are separate corporate entities involved here, for clarification, it would be good if you could refer to the specific corporation by the full name rather than just by "Mobile."

If there is some particular way that you want to refer to Mobile Natural Gas, Incorporated in a shortened form, that is fine, but it would help if you kept those companies separate as you testify.

I'm going to hand you two documents which have been marked previously as Appellant's Exhibit 9-A and Appellant's Exhibit 9-B.

I would like you to identify each of those documents separately, if you can, and explain what involvement, if any, you may have had with the negotiations and/or execution of those documents.

A. Exhibit 9-A is a gas purchase contract between Mobile Oil Corporation, Mobile Producing Texas and New Mexico, Incorporated, Mobile Oil Exploration and Producing Southeast, Incorporated, Mobile Exploration and Producing North American, Incorporated selling gas to General Motors. Exhibit 9-B is an amendment to the 9-A contract.

I was involved directly in the discussions with General Motors and the submission of a proposal for the business that's covered in these contracts. I was [II-25] directly involved in the negotiations of the contract terms and the administration of the sales that occurred under this contract.

Q. Would that include the sales that took place under the contract as amended as well?

A. Yes.

Q. I'm going to hand you four documents which have been marked previously as Appellant's Exhibit 10-A, 10-B, 10-C, and 10-D. Again, I would ask you to identify each of those documents separately and state what involvement, if any, you may have had in the negotiations and/or execution of those documents.

A. Exhibit 10-A is a natural gas contract for sales of gas from Mobile Natural Gas, Incorporated to General Motors. Exhibits 10-B, 10-C and 10-D are amendments to the Exhibit 10-A contract.

I was responsible for developing the business proposal that was submitted for this business and in negotiating the contract that

resulted and administering the sales of the gas that occurred under this contract, including it's amendments.

Q. Who signed the contracts on behalf of Mobile Natural Gas?

A. The contract, Exhibit 10-A, was signed by D. R. Briggs from Mobile.

[II-26] Q. Who signed the amendments?

A. I signed all three amendments; Exhibits 10-B, C and D.

* * * *

Q. Mr. Freeman, I'm going to hand you a document which has been marked previously as Appellant's Exhibit 15 till ask you to identify that document if you can and to state what involvement, if any, you may have had in the negotiations and/or execution of that document.

A. This is a natural gas contract between Mobile Natural Gas, Incorporated and General Motors. I was involved in developing the business proposal, in negotiating the contract and administering the sales that occurred under this contract.

Q. Finally, I'm going to hand you what has been marked previously as Appellant's Exhibit 12. I would [II-27] ask you to identify that document, if you can, and to state what involvement, if any, you may have had with the negotiations and/or execution of that document.

A. It's a natural gas contract for the sale of gas from Mobile Natural Gas, Incorporated to General Motors Corporation.

I was involved in developing the proposal for this sale, negotiating the contract and administering the sales which occurred under this contract.

Q. Mr. Freeman, under the terms of each of the contracts that you just identified, as you understand those terms, where did title to the natural gas sold to G.M. under those contracts actually pass or occur?

* * * *

THE WITNESS: Title to the natural gas from Mobile Natural Gas to G.M. — General Motors occurred at the delivery point into the initial receiving pipeline.

[II-28] BY MR. DUFFY:

Q. I am going to refer you back to Appellant's Exhibit 9-A, page 23 of that document; the article in the document headed Roman Numeral IX. What is your understanding of the terms "delivery point" or "point of delivery" as used in that article?

A. That is the point — the location of the delivery of natural gas into the initial receiving pipeline.

Q. And were any of the locations or the points of delivery in that contract located in Ohio?

A. No.

Q. Are they identified in the contracts?

A. Yes, they are identified fairly specifically in the various appendices.

Q. Okay. Would you state whether or not there would be additional points of delivery identified in any of the amendments to those contracts?

A. Additional — I'm sorry?

Q. Additional points of delivery in the amendments to the contracts; either that one or any of the ones you have identified.

A. There are deliver points specified in the exhibits.

Q. Would your answer regarding the term "point of delivery" as you understand it with regard to [II-29] Appellant's Exhibit 10 — Excuse me, Appellant's Exhibit 9 be the same for the other contracts you identified?

A. Yes.

Q. That did not change over the period?

A. No.

Q. How does the natural gas that was sold under these contracts that you just identified get transported or delivered to the point of delivery?

A. There are several different scenarios for that. In some instances the gas is delivered directly from the well or platform into the pipeline at the point of delivery.

Sometimes it's delivered at the tailgate of a processing plant where the producer will get the gas to that plant on his own and deliver the gas at the point of delivery at the manifold, at the tailgate of that plant.

There are instances where Mobile uses its own transportation in the production zone to move gas to the delivery point.

Q. Again, you have used the term "Mobile." Who are you referring to?

A. Mobile Natural Gas.

Q. During the audit period, would you state whether [II-30] Mobile Natural Gas, Incorporated or one of its affiliates ever transported gas sold under any of the contracts you have just identified from the point of delivery designated in that contract to any of the G.M. facilities in Ohio that I identified to you previously; that is the Lordstown plant, the Defiance Central Foundry plant or the Packard Electric Division facility in Warren?

A. Yes. Mobile has used its own transportation agreement on the initial receiving pipeline to deliver gas into Ohio to those plants.

* * * *

[II-34] * * * *

Q. Mr. Freeman, how often did Mobile Natural Gas deliver or transport gas to the General Motors facilities that I just identified during the audit period?

A. According to the records, for several months in 1988.

Q. Was it a regular occurrence under all of the contracts?

A. No. It occurred specifically under contract 9-A as amended.

Q. What amendment are you referring to?

A. Specifically the amendment is Exhibit 9-B.

MR. DUFFY: I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard, you may proceed with your cross-examination.

MR. HUBBARD: Thank you, your Honor.

[II-35] CROSS-EXAMINATION

BY MR. HUBBARD:

Q. Are you initially from Pennsylvania?

A. Yes.

Q. So am I. I recognized your accent. You didn't have a southern accent. Do you work for Mobile Natural Gas, Inc.; is that your employer?

A. Yes.

Q. Okay. You are not employed then by Mobile, the parent corporation, Mobile Oil Corporation?

A. Not at this time.

Q. Okay. You were at one point, but then when Mobile Natural Gas, Inc. was incorporated, you then at that time became employed by Mobile Natural Gas, Inc.; is that right?

A. Yes.

Q. Does Mobile Natural Gas, Inc. own or control any facilities over which natural gas is delivered to Ohio consumers?

A. Mobile Natural Gas, Inc. itself owns no equipment, pipelines, et cetera. Could you explain what — give me a definition of "controlling," and I could better answer your question.

Q. By "control," I mean leases the equipment or [II-36] leases the pipelines, the facilities under which the transportation of the gas is performed.

A. Mobile Natural Gas has transportation agreements on pipelines which enable us to transport gas by making nominations for that transportation service.

To that extent, we exert some degree of control, of course, over those shipments in keeping with the pipeline transportation agreement.

However, we don't — I wouldn't call that leasing the facilities, nor do we have people who go out and control the pipelines by turning valves or setting instrumentation. We control our activities by making nominations.

Q. So Mobile Natural Gas, Inc. has no physical control over the facilities that are used to transport the gas; is that correct?

A. We don't turn valves or set instruments. We make a nomination over the transportation agreement.

Q. The entity with whom you're contracting with has that control, and it owns the facilities; is that correct?

A. Yes.

Q. What are those entities?

A. Various pipeline companies; ANR Pipeline, Panhandle Eastern, et cetera. There are 92 different [II-37] pipelines that we utilize to transport gas.

Q. Are those companies — are those pipeline companies regulated by federal and state regulatory authority, such as public utilities?

A. The interstate pipelines are regulated. I'm not a regulatory expert, so I am not qualified to make any further determination than that. There are intrastate pipelines, of course, that are not regulated by the government.

Q. And it would be your understanding that they may or may not be regulated by the state or locally?

A. That's right.

Q. Okay. With respect to Mobile Natural Gas and the affiliates that are referenced in these agreements, are any of those entities regulated by the federal government or by any local or state governmental unit as a public utility?

A. Not to my knowledge.

Q. Are you familiar the filings for taxation purposes of Mobile Natural Gas, Inc.?

A. I probably wouldn't have knowledge of our tax filings. That's not something that I deal with on a day-to-day basis.

Q. Do you know whether there would be any returns filed by Mobile Natural Gas in Ohio?

[II-38] A. No.

Q. Now, you made the statement that for a period of time in 1988 that Mobile Natural Gas provided for the delivery of gas to General Motors; is that correct?

A. Yes.

Q. Did Mobile Natural Gas, Inc. or its affiliate utilize any of their own facilities to transport that gas?

A. I can't answer that about Mobile affiliates. We do have natural gas pipelines, and of course, we own processing plants. One of the features of the —

Q. By "affiliates," I mean the affiliates referred to in the agreements.

A. Right.

Q. Okay.

A. Right. They own processing plants and physical hardware that gas could have passed through under these agreements.

Q. Okay.

A. One of the features of the direct-market business is to be non source specific which gives the supplier the flexibility of moving gas from his whole reserve portfolio to meet a customer's need, as opposed to specifying a well or lease, as sales in the traditional markets previous to the direct market were conducted.

[II-39] Q. Mobile Natural Gas, Inc. is a — would you characterize it as an independent marketer of natural gas?

A. I would classify us as a producer/marketer.

Q. Okay. But not necessarily independent because you have related entities; is that right?

A. Not independent because we are responsible for selling a significant portfolio of Mobile equity gas.

Q. Do you sell any gas other than gas that's produced by Mobile?

A. Yes.

Q. So in that sense, you should be independent?

A. Right. We like to think that we bring the best of a producer/marketer which is secured reserves and the benefit of an independent marketer who provides the services that the customers need, we can marry those two beneficial aspects together in Mobile Natural Gas.

Q. Now, Mobile Natural Gas, Inc. doesn't own any physical facilities over which gas is transported?

A. No.

Q. With respect to the statement that was made; that there was delivery of gas in Ohio in 1988 pursuant to the contract identified as 9-B the amendment —

A. Yes.

Q. — who actually performed the transportation of [II-40] that gas in Ohio?

A. Mobile Natural Gas, under its own transportation agreements, transported some of the gas that's covered in Exhibit 9-B.

Q. And whose facilities were used?

A. I believe it was Panhandle Eastern and Trunk Line Gas Company.

Q. So Panhandle Eastern and Trunk Line —

A. Trunk Line Gas Company.

Q. — actually performed the transportation; is that correct?

A. The gas was transported on those interstate pipelines. Right.

Q. And there are people who controlled — physically controlled that transportation of the gas, correct?

A. Well, we're back to that situation where they operate the pipeline.

Q. Right.

A. But we exert a degree of control by making a nomination under the terms of the transportation agreements and the transportation tariffs that permit us to be able to move gas on that pipeline.

Q. Okay. But they are operating the pipeline? "They" meaning the pipeline companies are operating that pipeline; is that correct?

[II-41] A. The pipeline companies are operating the pipelines. We have the opportunity to make a nomination to move gas and to change that nomination as our customers and Mobile Natural Gas sees fit.

Q. By nomination, you mean you designate how much gas you want delivered; is that correct?

A. Yes. Essentially that's right.

Q. So essentially, you're directing a pipeline company to deliver the gas on your behalf; is that correct?

A. Yes.

Q. Did the pipeline companies then deliver directly to General Motors, or do they deliver it to a local distribution company?

A. Could be either. Probably occurred both ways.

Q. You don't know, right?

A. Not without doing some research.

Q. Do you know what a local distribution company is?

A. Yes.

Q. Could you describe what that is?

A. It's a company which takes gas off of a major pipeline and steps down those volumes and delivers them to individual customers.

In the case of a local distribution company, you think of residential- and commercial-type customers [II-42] along with industrial customers.

Q. Is there a distribution company other than a local distribution company?

A. I wouldn't make a differentiation between a distribution and local distribution company.

Q. Same thing?

A. Same thing.

Q. Is the pressure of the gas at that point changed when it gets to the distribution level?

A. Yes.

Q. Now, with respect to the statement that in 1988 gas was delivered or transported pursuant to your transportation agreements by Mobile Natural Gas to Ohio to General Motors, are you making the statement that the gas at that point — the title to the gas was still in the name of Mobile Natural Gas, Inc.; is that the distinction that you're making?

A. What occurred was we delivered that gas into the initial receiving pipelines, and that is where title changed.

Q. And that would be outside the State of Ohio?

A. Yes.

Q. So that is true of all of these transactions?

A. Yes.

Q. Okay. So what made — Isn't it true with respect [II-43] to all of the gas that is sold by Mobile National Gas, Inc. and its affiliates to G.M.; that it's delivered by someone other than Mobile Natural Gas, Inc. to General Motors? That's true of all of the gas, isn't it?

A. Can you restate that for me, please.

Q. Okay. Isn't it true with respect to all the transactions between Mobile Natural Gas, Inc. and its affiliates and General Motors during the audit period, that all of the gas delivered in each instance was delivered by someone other than Mobile Natural Gas, Inc. or its affiliates?

* * * *

THE WITNESS: In Exhibit 9-B, we delivered gas to General Motors under our [II-44] transportation agreement.

BY MR. HUBBARD:

Q. Now, the transportation agreement that you had was these pipeline companies, Eastern and what was the other one?

A. Panhandle Eastern, Trunk Line Company.

Q. Panhandle Eastern and Trunk Line. They were the ones who actually delivered the gas, didn't they, to General Motors?

* * * *

THE WITNESS: We made a nomination to the pipeline under our transportation agreements, and that transportation agreement permits the gas to be [II-45] delivered in Ohio under Exhibit 9-B.

Q. Okay. So in that sense, and only in that sense are you saying you deliver it, because you're directing someone else to deliver it?

A. Correct.

Q. Now, with respect to — I think I figured out what the distinction is.

With respect to all of the other transactions, other than the ones in 1988 that you referred to, is it G.M. who contracts for the transportation of the gas from the initial receiving point?

A. Right. In most cases, and this is common in the industry, it's the customer who prefers to hold his own transportation down into the production zone. It's the gas marketing companies that aggregate that as gas in the production zone and delivering it to the customer's transportation.

However, as in Exhibit 9-B, if the customer needs or desires to have the gas delivered, we have that capability also. And we transport in the production zone to those initial receiving pipelines —

Q. Okay.

A. — quite a volume of gas.

Q. So the general role with respect to these [46] contracts is that General Motors contracted separately for the delivery of the gas from the initial receiving point outside Ohio to General Motors in Ohio?

A. Yes.

Q. But with respect to the transactions that were — that occurred pursuant to Exhibit 9-B, that wasn't the case; is that right?

* * * *

THE WITNESS: Under Exhibit 9-A and 9-B, both situations occurred. We delivered gas into initial receiving pipelines where General Motors held the transportation. And we also delivered gas into initial receiving pipelines where Mobile had the transportation.

Q. Thank you.

A. Mobile Natural Gas.

Q. All right. Okay. In your industry, do you refer to yourself as a marketer or broker of natural gas?

A. I would say we are a marketer of natural gas.

THE EXAMINER: Excuse me, Mr. Hubbard. When you say — refer to "yourself," are you referring Mobile Natural Gas?

MR. HUBBARD: Yes, I'm sorry.

[II-47] BY MR. HUBBARD:

Q. You meaning Mobile Natural Gas and you personally being an employee manager of Mobile Natural Gas, Inc., you refer to Mobile Mobile Natural Gas, Inc. as a marketer in your negotiations and discussions with clients?

A. I would classify Mobile Natural Gas as a natural gas marketing company.

Q. Are there several other natural gas marketing companies?

A. Yes.

* * * *

[II-49] * * * *

Q. Are you aware of other natural gas marketers who provide services similar to your company's?

A. There are other gas marketers in the business out there. I think McKenzie and Company did a study, and there are 300 natural gas marketing companies. McKenzie sees some of the major ones as Natural Gas Clearinghouse, Texaco, Shell.

Q. Are you aware of a company in Ohio called Access Energy?

A. Yes.

Q. Are they also in your business of marketing natural gas?

A. I believe they are owned by Enron.

Q. Is this the relatively recent industry that came about in the 1980's; this natural gas marketing industry?

A. Yes.

Q. And I believe you testified that Mobile got into this business in approximately mid 1986; is that correct?

A. Yes.

[II-50] Q. And they did it through their wholly-owned subsidiary, Mobile Natural Gas, Inc.?

A. The corporate entity, Mobile Natural Gas, Inc., was established in mid '87. Prior to '87, we operated as an affiliate of Mobile Oil Corporation.

MR. HUBBARD: I have no further questions of the witness at this time, your Honor.

THE EXAMINER: Thank you, Mr. Hubbard. Mr. Duffy, redirect?

MR. DUFFY: Just a minute.

(Discussion off the record.)

REDIRECT EXAMINATION

BY MR. DUFFY:

Q. Mr. Freeman, I think I have just three questions. You were asked by Mr. Hubbard whether you knew what a local distribution company was, and you explained that to him.

Taking that explanation that you gave him, did you have transportation agreements with local distribution companies during the audit periods?

When I say "you," Mobile Natural Gas, Inc.; whether you arranged or did your own transportation?

A. No. For sales to G.M.?

[II-51] Q. I am talking about to any customers.

A. Not to my knowledge.

Q. Okay. You made some reference or you made a response to Mr. Hubbard about regulating the pressure of natural gas; that that was something that the local distribution company did.

Might one of your end users or customers have their own pressure regulators at their facilities?

A. Yes.

Q. You have made references to situations during 1988 when you transported natural gas purchased by G.M. pursuant to the amendments to the contract that you have identified as Exhibit 9-B.

When you did that, did you charge General Motors separately for that transportation?

A. It was added to the price that we had previously negotiated under the base contract for the gas.

Q. Okay. So it wasn't something that you did for free under the terms of the original agreement?

A. No. The cost that we incurred in our transportation was added to the purchase price that was previously agreed to in the base contract.

MR. DUFFY: Okay. I have no other questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. [II-52] Mr. Hubbard.

MR. HUBBARD: None at this time, your Honor.

THE EXAMINER: Thank you, Mr. Freeman. You may step down. (Witness excused.)

* * * *

[II-57]* * * *

THE EXAMINER: Mr. Duffy, you may call your next witness.

* * * *

MR. DUFFY: I'd like to call Mr. Schuch to the stand. (Witness sworn.)

* * * *

[II-58] Jon Schuch

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUFFY:

Q. Mr. Schuch, would you state your full name for the record, and would you spell your first name and your last name.

A. My full name is Jon J. Schuch. J-o-n, last name is S-c-h-u-c-h.

Q. Mr. Schuch, are you currently employed, and if so by whom?

A. I'm currently employed by General Motors, and specifically the Energy Supply Division of General Motors.

Q. What is your current business address?

A. Current business address is 485 West Milwaukee, that's Detroit, Michigan 48202.

Q. Mr. Schuch, how long have you been employed by General Motors Corporation?

A. Just a little bit over 25 years.

Q. What is your current position with General Motors, and how long have you held that position?

A. Currently I'm manager of transported gas. I have held that position since September '91.

[II-59] Q. What are your duties and responsibilities as manager of transported gas for General Motors?

A. I am in charge of purchasing natural gas and arranging for the transportation of that gas to our plant for about 130 plants nationwide.

Q. When was the Energy Supply Division of General Motors created, and what is its function or purpose within the corporation?

A. The Energy Supply Division was created back in 1974. Its initial function was to operate a gas field in northeast Ohio and supply gas to various plants in Ohio because of curtailments that we were having at that time.

In 1984, the Energy Supply Division expanded its activities into a gas marketing function. At that point in time, when the gas industry was deregulated, and we could purchase gas from suppliers and marketers, we began to do that. And since 1984, have expanded that activity to where we are now supplying about 130 plants.

Q. Mr. Schuch, what is your educational background?

A. I have a Bachelor's Degree in Economics from the University of Wisconsin, Madison. I have an M.B.A. from University of Dayton in Business Management.

Q. Do you hold any professional designations or [II-60] certificates?

A. I am a Registered Professional Engineer in the State of Ohio.

Q. Beginning with the date of your initial employment with General Motors, and coming forward to the present time, would you please state what positions you have held with the company; the period of time you held each such position, and the duties and responsibilities associated with each position?

A. I started with G.M. in 1968 with the Frigidaire Division. I worked for them for about seven years; held a position initially as a production foreman in charge of various assembly and machining operations.

I spent two years as as process engineer, and I was working on plant layout, projection and buying material-handling equipment; spent a couple of years as Director of Safety and Security, from '75 to '78, kind of changed names, the division subdivided.

I was working for Delco air-conditioning as an assistant superintendent and plant engineer. I was in charge of energy and environmental-type projects.

In '78 I transferred to Detroit, the corporate energy management section, worked there for four years as a staff project engineer. I was in charge of coordinating energy conversion projects for all of the [II-61] plants across the country.

I also spent a couple of years in the corporate energy management group working in the regulatory and legislative areas and expressed G.M.'s opinions to various governmental agencies and legislators as far as our position and the impact of regulation and pending legislation.

In '82, I transferred back to Ohio as Operations Manager for the Lordstown Gas Field. In that function, I was in charge of

basically production and transmission of gas here in Ohio. And then also as I mentioned previously, in '84, that position expanded to include gas marketing for all plants nationwide.

In September of '91, I transferred back to Detroit, the position that I have now, Manager of Transported Gas. And I also picked up some additional responsibility for electric wheeling, which is something that is just now coming to the forefront. I think that pretty well sums it up.

Q. Thank you. Mr. Schuch, one of the issues in these consolidated appeals involves an assessment of Ohio use tax and natural gas purchased by General Motors Corporation during the period from October 1, 1986 through December 31, 1990.

[II-62] The natural gas that was purchased was used at three facilities in Ohio; the Lordstown plant, Defiance Central Foundry plant, and the Packard Electric facilities in Warren, Ohio.

Are you personally familiar with any transactions during this time period involving the purchases of natural gas by G.M., and if so, would you explain how you happen to be familiar with those transactions?

A. Yeah, I am familiar with those transactions. I was personally responsible for negotiating the purchase contracts for the gas that was acquired and also negotiating transportation contracts where we transported gas from the point of delivery through interstate pipelines and local distribution companies to our plants.

Q. Mr. Schuch, I'm going to hand you two documents which we marked previously as Appellant's Exhibits 9-A and 9-B. I would like you, if you could, please, to identify each document separately and to explain what involvement, if any, you may have had with the negotiation and/or execution of those documents.

A. Okay. The 9-A document is a gas purchase contract, and 9-B is an amendment to that gas purchase contract.

I was responsible for negotiating the terms and [II-63] provisions of this contract and the amendment. That also involves

negotiating the contract terms, reviewing these contracts with our legal staff, getting their approval and preparing the documents for execution by duly authorized officers of General Motors.

Q. I'm going to hand you what have been marked previously as Appellant's Exhibits 10-A through 10-D. And again, I would ask you to identify, if you can, separately each of those documents and to explain what involvement, if any, you may have had in the negotiation or execution of those documents.

A. Again, what we have here is 10-A, a gas purchase contract. This involved delivery of gas into northeast Ohio. And we also have 10-B, an amendment to that purchase contract. And again, I had the responsibility for negotiating these contracts.

Q. How about 10-C and 10-D?

A. Exhibits 10-C and 10-D are also amendments to this gas purchase contract. I also negotiated those.

Q. I'm going to hand you what has been marked previously as Appellant's Exhibits 11 and 12 and ask if you would identify each of those documents separately, if you can, and to state what involvement, if any, you may have had in the negotiation or execution of those documents.

[II-64] A. These documents are both gas purchase agreements between General Motors and Mobile Natural Gas. One contract covers deliveries into the ANR pipeline, and the other contracts involve Texas — deliveries of gas into Texas Gas' transmission and Panhandle Eastern's pipelines. That's 11. And again, I was responsible for negotiating these on behalf of General Motors.

Q. I'm going to hand you two documents which have been marked previously as Appellant's Exhibit 13-A and 13-B and ask if you could identify those two documents separately, and to explain what involvement, if any, you may have had in the negotiation or execution of those documents.

A. Again, we have a gas purchase agreement. This is between General Motors and Yankee Resources, it's 13-A.

Exhibit 13-B is a document — it's an assignment of the contracts. And that was when Yankee Resources, I believe, became Access Energy. I was responsible for negotiating the agreements.

Q. I am going to hand you what has been marked previously, or what have been marked previously as Appellant's Exhibits 14-A through 14-D. Again, I would ask that you look at each of those documents, and if you can identify each of them separately and state what involvement, if any, you had in the negotiation or [II-65] execution of those documents.

A. Exhibit 14-A is a gas purchase agreement between General Motors and Rocky Mountain Energy. This was for delivery of gas including some plants in northeast Ohio. And then 14-B, C and D are amendments to that contract. Again, I was involved in negotiating the terms of these contracts and amendments.

Q. Okay. Finally I'm going to hand you what has been marked previously as Appellant's Exhibits 15-A through 15-H and ask you to identify each of those documents separately and to state what involvement, if any, you may have had in the negotiation or execution of those documents.

A. This was a contract — 15-A is a gas purchase contract between Wellhead Enterprises, Incorporated and General Motors. The rest of these documents 15-B through 15-H are amendments to that contract. This was a gas supplier to our Defiance plant. And again, I was responsible for negotiating these contracts and amendments.

Q. Does G.M. currently purchase any gas from either Wellhead Enterprises, Inc. or Rocky Mountain Energy Exchange?

* * * *

[II-66] * * * *

THE WITNESS: No, we don't. These two companies are no longer in business.

THE EXAMINER: Excuse me, Mr. Duffy. Before you proceed, with respect to Appellant's Exhibit 15-A, would you have the witness identify the date that the agreement became effective?

THE WITNESS: We don't have the specific date here. It was 1986. I would have to further peruse our files to get that date.

BY MR. DUFFY:

Q. Do you remember approximately when the agreement was executed?

A. Generally most of our contract purchase year starts on July 1 of each year and goes through June 30th of the following year. So I would say we are probably talking July '86 when this was executed.

Q. Do any of the amendments recite when the contract was originally executed?

A. Yes. Exhibit 15-B indicates it was July 24 of '86.

[II-67] THE EXAMINER: Thank you, Mr. Duffy. Please excuse my interruption.

MR. DUFFY: That's fine.

BY MR. DUFFY:

Q. Mr. Schuch, who at G.M. maintains control and custody of the original contracts that you just identified?

A. That falls under my responsibility. We keep those records in our Lordstown, Ohio office.

Q. How was the natural gas that was purchased during the audit period under the various contracts that you just identified here transported or delivered to the three G.M. facilities in Ohio where it was used during the audit period?

A. I guess we could kind of divide the Defiance plant on the northwest side of Ohio and the other two plants, Packard and Lordstown are northwest Ohio. So the gas into Defiance was transported — We had contracts with Panhandle Eastern Company

initially and we moved gas for several years on Panhandle. And then ANR Pipeline, which is American Natural Resources, built a five-mile extension into our — into the Defiance plant area. Then we switched pipelines and are still transporting on ANR. When ANR constructed their lines into the Defiance area, a local utility [II-68] company, Ohio Gas, agreed to transport directly into the plant.

MR. HUBBARD: Your Honor, is that the full name, Ohio Gas?

THE WITNESS: It's Ohio Gas Company. Then on the northeast deliveries into the Packard and B.O.C. Lordstown, the mode of transportation was we contracted with Texas Gas Transmission. They operate out of Texas and Louisiana. They redeliver to Consolidated Gas Corporation, which is an interstate pipeline that operates in the Appalachian basin. They also are the parent company of East Ohio Gas, and then would redeliver into East Ohio Gas. East Ohio Gas would then deliver to our plant location.

BY MR. DUFFY:

Q. Mr. Schuch, would you explain generally how G.M. accounts for the natural gas that is purchased under all of these contracts and actually bills the various plants for the gas — bills the plants for the gas used?

A. All the invoices from the various producers and marketers come into our Ohio office, and also all of the bills from all of the transporting parties; the [II-69] interstate pipelines, intrastate pipelines, local distribution companies also come in.

We verify the volumes, the rates and the price of the gas. I approve all of those invoices. We have a staff accounting group in Detroit that then takes all of the individual costs, adds them together and then we rebill the plants.

Q. When you say "we," are you talking about the Energy Supply Division?

A. It's actually staff accounting, centralized staff accounting group.

Q. But it's the company doing an intra-company billing?

A. Yes.

Q. I'm going to hand you the Statutory Transcript that is filed in case no. 92-510. I am going to ask you to look at, for example, page 185 of the transcript. If you would just explain what is contained on that page.

A. Okay. This is a bill from Mobile Natural Gas, Inc., one of our gas suppliers. This is just a listing of the volumes and the gas prices for a particular month.

Q. Okay. Does the bill continue over onto other pages?

[II-70] A. Looks here like we've got several pages involved with this.

Q. The bill itself does not consist of just one page?

A. Right.

Q. Would you state whether or not that invoice is representative of the type of invoices you would receive from Mobile Natural Gas?

A. Yes, they are. There are usually four or five pages to the typical Mobile invoice.

Q. And this would be for a specific time period?

A. Right, for usually a monthly bill.

Q. I am going to ask you to look at page 175 of the same transcript and ask if you could identify what is contained on that page?

A. Okay. That's an invoice from ANR Pipeline Company. That would be an invoice for transportation services. This happens to be the month of June 1989. It just lists various charges, a detail of what is included in the bill for that month.

Q. Would this be representative of one of the bills you would receive pursuant to one of the transportation agreements that you might have with one of those pipeline companies?

A. Yes, very typical.

[II-71] Q. I'm going to hand you again the same Statutory Transcript and ask you to look at page 179 of the transcript. Tell me what it is contained on that page.

A. Okay. This is a billing from the Ohio Gas Company in Bryan, Ohio. This is, again, an invoice for the transportation charges assessed for delivering the gas from the delivery point from the pipeline into our plant.

Q. Would that be typical of a bill that you would receive from Ohio Gas Company?

A. Yes.

Q. By "receive," would you say whether or not you would receive a similar type bill from East Ohio Gas Company?

A. Yes.

Q. And that would be for the delivery of gas to Lordstown and Warren?

A. Right.

Q. Finally, I am going to ask you to look, for example, at page 184 of the same transcript and ask if you would identify what is contained on that page.

A. This is an invoice that we generated internally from our staff accounting group. This is a billing that we sent over to central foundry. This is, as I mentioned before, the total volume for the month and [II-72] then the total of all of the charges added together, and they get their monthly bill.

Q. Would you state whether or not this would be typical of the kind of invoice that would be sent to any of the three facilities in Ohio?

A. Right. This is standard format.

Q. How many facilities did you say you purchased gas for?

A. Roughly about 130 plants.

Q. Would you state whether or not this type of billing would be typical for all these?

A. Right, same format.

* * * *

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard, cross-examination.

[II-73] CROSS-EXAMINATION

BY MR. HUBBARD:

Q. Is it Mr. Schuch?

A. Yes.

Q. It surprised me when you said you've worked for G.M. for 25 years because you certainly don't look old enough —

A. Thank you.

Q. — to have worked there for 25 years. I take it that right out of school you started working for G.M.?

A. Yes, sir.

Q. I believe you stated that starting in 1984 or thereabouts, gas marketing in Ohio was something that General Motors initiated at that point?

A. That's correct.

Q. And that you were — you headed that function in Ohio?

A. Right.

Q. Is that right?

A. Yes.

Q. Okay. What do you mean by "gas marketing"?

A. Arranging contracts for gas deliveries to our plants.

Q. Okay. Would that include situations where you're [II-74] dealing with local distribution companies and buying gas from them?

A. No. No. We basically shifted at that point in '84, shifted away from buying from utility companies and bought gas directly from producers and marketers.

Q. Do you still buy some gas from the local distribution companies?

A. Across the country, we have some tariff purchases, yes.

Q. In Ohio, do you? Or did you during the audit period?

MR. DUFFY: Are you talking about these three facilities or any facility in Ohio?

MR. HUBBARD: Well, these three facilities first, I guess.

THE WITNESS: There may have been a small percentage of gas. But 99 percent I would say would be bought by this other method.

BY MR. HUBBARD:

Q. Then with respect to your other plants in Ohio.

A. Yeah. That's what I mean, across Ohio.

Q. Across Ohio, including these three plants?

A. Yeah.

Q. Okay. The local distribution company is a company that both sells the gas and then deliveries the [II-75] gas to the end user, consumer; is that right?

A. That's not typically — they don't sell to General Motors.

Q. Okay.

A. They transport it.

Q. Okay. But local distribution — what is a local distribution company?

A. Well, a local distribution company, as far as an industrial end user, it's a company that transports gas from where it receives gas from interstate pipelines and redeliveries the gas to our plants.

Q. Okay. And is it typically the case, to your knowledge, that the local distribution companies also sell the gas?

A. For residential, commercial customers.

Q. Okay. For industrial customers, they are also engaged in providing purely transportation services; is that correct?

A. Right. We can buy gas from the distribution company, but it's basically not economical.

Q. Since 1984 when you instituted this gas marketing program, you hadn't done that prior to that time. Was that the primary way you purchased gas?

A. Yes, from either distribution companies or directly from pipelines. In Defiance, Ohio, there was [II-76] no distribution company historically.

Q. Okay. Now, East Ohio Gas, you identified, provided the last leg of the transportation of the gas?

A. That's correct.

Q. And they are a local distribution company, correct?

A. Yes.

Q. And something like that Ohio Gas Company, is that also a local distribution company?

A. Right.

Q. Okay. And then they are engaged in selling gas as well as transporting it?

A. I believe so.

Q. And by "they," I mean East Ohio Gas; is that correct?

A. Yeah.

Q. And you believe they —

A. Paid the bills.

Q. And Ohio Gas also?

A. Right.

Q. Are the companies that you identified in the contracts or that General Motors contracted with, and that you have identified as exhibits in this case, are all of those companies marketers of natural gas?

A. Marketers and/or producers of gas.

[II-77] Q. Okay.

A. Yeah.

Q. Are those entities — are any of those entities regulated as public utilities?

A. Not to my knowledge.

Q. What is the basic distinction between a pipeline company and a local distribution company?

A. We essentially, in our contracts, define — our definition of pipeline includes interstate and intrastate or local distribution companies. We basically define them as transporters of natural gas.

Q. Is it typically the situation, and I am referring to the audit period and the contracts that have been identified, that the agreement provided for General Motors to purchase the gas from

the marketer and then General Motors was to arrange for its transportation from the initial receiving point?

A. That's correct.

Q. Okay. And are there any exceptions to that, to your knowledge, with respect to the contracts that have been identified as exhibits?

A. There was one period of time where we utilized, I believe it was Mobile's — one of their transportation contracts.

Q. I'd like to refer your attention to page 182 of [II-78] the Statutory Transcript in B.T.A. Case No. 92-K-510. Do you have that handy?

A. No.

Q. I will give it to you. I note that this says "Summary of brokered gas used by Defiance plant, October 1, 1986 to June 30, 1990." Is that term "brokered gas" a term that you would use to describe the gas that's purchased from these, marketers under the agreements that have been identified as exhibits?

MR. DUFFY: I am going to ask that the witness first be asked if he can identify what the document is, if he has any familiarity with it.

MR. HUBBARD: Well, I will ask that question.

MR. DUFFY: You're asking him a question about what somebody else used in a document that maybe he didn't prepare.

MR. HUBBARD: I am asking him if that is a term that is used.

MR. DUFFY: I don't care as long as you're going to then establish that he has some familiarity with the document.

THE EXAMINER: Mr. Hubbard, if you simply wish to ask the witness what his opinion of the [II-79] term "brokered gas" constitutes, you may do so. If you wish to refer to a specific document, I would request that you ask the witness to identify or provide a foundation.

BY MR. HUBBARD:

Q. Do you recognize that term "brokered gas"?

MR. DUFFY: Not as used in the document.

MR. HUBBARD: It doesn't matter whether it's used in the document or not. I can reference something that's in a document, whether or not he knows that particular document. There is no rule of evidence that says I can't.

MR. DUFFY: I don't care as long as the record reflects that he is not testifying as to what the term "brokered gas" means in that document.

MR. HUBBARD: Certainly. That wasn't what the question was.

MR. DUFFY: Okay.

THE EXAMINER: Is the objection withdrawn?

MR. DUFFY: That's fine. As long as that is the understanding of everybody.

MR. HUBBARD: Okay.

THE WITNESS: We kind of use — [II-80] internally as far as what we do, marketing and brokering is kind of interchangeably.

BY MR. HUBBARD:

Q. Okay. So that is a term that is used by General Motors to describe these transactions?

A. Um-hum.

Q. Correct?

A. It's what we do as far as arranging for purchase and acquisition and transportation. It's an internal brokering or marketing function.

Q. Okay. And that term is used by General Motors internally?

A. Yes.

Q. Okay. Can you identify this document?

THE EXAMINER: You're referring to the Statutory Transcript?

MR. HUBBARD: Page 182.

THE EXAMINER: Thank you.

BY MR. HUBBARD:

Q. It may assist you in looking at this. You had earlier identified what page 184 was of that particular Statutory Transcript.

A. Well, this is a monthly summary of deliveries to the Defiance plant.

Q. Would that have been prepared by General Motors?

[II-81] A. I believe it was, yes.

* * * *

Q. Okay. And I believe it was your testimony on direct examination that determining the allocation of [II-82] the cost for each plant was something that staff accounting services of G.M. assisted in or primarily did?

A. That's correct.

Q. Is that correct?

A. Um-hum.

MR. HUBBARD: I have no further questions of the witness at this time.

THE EXAMINER: Thank you, Mr. Hubbard. Mr. Duffy, redirect..

REDIRECT EXAMINATION

BY MR. DUFFY:

Q. Mr. Schuch, in response to one of Mr. Hubbard's questions, you said your duties were to arrange for gas deliveries on behalf of General Motors Corporation. Would you state whether or not it's also true that you also arranged for gas purchases as well as gas deliveries?

A. That's correct.

MR. DUFFY: I have no further questions.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard.

[II-83] MR. HUBBARD: No further questions, your Honor.

THE EXAMINER: Thank you, Mr. Schuch. You may step down. (Witness excused.)

THE EXAMINER: Mr. Duffy, you may call your next witness.

MR. DUFFY: I have no further witnesses to call at this time. I would move the admission of Appellant's Exhibits 9-A, through 15-H.

THE EXAMINER: Thank you, Mr. Duffy. For ease of reference, Mr. Hubbard, I will first refer to the documents to which the testimony was initially received from Mr. Freeman; those being Appellant's Exhibits 9-A through 12. Are there any objections to those documents being received into evidence?

MR. HUBBARD: No, your honor. I have no objections to any of those documents, 9-A through 15-H.

THE EXAMINER: All right. There is no need for me to further testify as to Appellant's Exhibits at this time other than to state for purposes of the record, Appellant's Exhibits 9-A through 15-H [II-84] will be received into evidence and considered by this Board.

Thereupon, Appellant's Exhibit Nos. 9-A through 15-H were received into evidence and made a part of the record herein.

MR. DUFFY: I have several other documents that I want to offer into evidence that are self-authenticating by certification of state officers.

THE EXAMINER: All right.

MR. DUFFY: I have marked a document as Appellant's 16, stated on its face to be a copy of an entry issued by the Public Utility Commission of Ohio under case no. 82-1435-GA-ARG styled "In the Matter of the Application of CNG Development Company for relief of the duty of Compliance with the obligation Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921 and 4923 of the Revised Code."

It's certified by the Secretary of the Public Utilities Commission as being an authentic copy of their records.

* * * *

[II-85] * * * *

Thereupon, Appellant's Exhibit No. 16 was received into evidence and made a part of the record herein.

MR. DUFFY: I have marked as a [II-86] document Appellant's Exhibit 17. It is a certified copy of a foreign corporation application for license filed by Mobile Natural Gas, Inc. It is certified by the Ohio Secretary of State as being a true copy of the document on file in that official's office. I would move its admission into the record.

* * * *

[II-88] * * * *

Thereupon, Appellant's Exhibit No. 17 was received into evidence and made a part of the record herein.

MR. DUFFY: I have marked as a document Appellant's Exhibit No. 18 as a certificate from the Ohio Secretary of State's Office regarding Mobile Natural Gas, Inc. stating the date on which it qualified to do business in the State of Ohio, the license number assigned to it, and a statement that the corporation is currently in good standing on the records of that official's office as of May 13th, 1993.

* * * *

[II-90] Thereupon, Appellant's Exhibit No. 18 was received into evidence and made a part of the record herein.

MR. DUFFY: Appellant's Exhibit is a document again certified by the Ohio Secretary of State. It's an application filed with that official by Yankee Oil and Gas, Incorporated for a license to transact business as a foreign corporation in the State of Ohio pursuant to the provisions of the Ohio Revised Code stated in the application. I would move its admission into the record.

* * * *

THE EXAMINER: Appellant's Exhibit will be received into evidence.

Thereupon, Appellant's Exhibit No. 19 was received into evidence and made a part of the record herein.

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* * * *

[II-91] * * * *

MR. DUFFY: I have marked as a document Appellant's Exhibit 20. Again, this is a document certified by the Ohio Secretary of State as being a copy of an application for license on behalf of a foreign corporation filed by an entity known as the Yankee Gas Company. I move its admission into the record.

* * * *

[II-92] * * * *

THE EXAMINER: * * * I will overrule the objection with respect to Appellant Exhibits 20. It will be received into evidence.

[II-93] Thereupon, Appellant's Exhibit No. 20 was received into evidence and made a part of the record herein.

MR. DUFFY: I'm going to hand to you what has been marked as Appellant's Exhibit 21. It is a document certified by the Secretary of the State of Ohio, on file in that office. It is something prepared by the Secretary of State in the State of Delaware regarding a merger of the Yankee Companies, Inc. with the Yankee Gas Company, a Delaware Corporation. I would move its admission into evidence.

* * * *

Thereupon, Appellant's Exhibit No. 21 was received into evidence and made a part of the record herein.

MR. DUFFY: Exhibit 22 as marked [II-94] as a certified copy of the document from the Secretary of State's Office in Ohio relating to a statement of a merger in the Delaware Secretary of

State's Office with regard to the Yankee Gas Company and a merger with Yankee International Company and Yankee Resources, Inc., both corporations then organized and exist under the laws of Delaware, and Yankee Pipeline Company, a corporation existing under the laws of Texas. I would move its admission into evidence.

* * * *

Thereupon, Appellant's Exhibit No. 22 was received into evidence and made a part of the record herein.

MR. DUFFY: Appellant's Exhibit No. 23 is a document certified by the Ohio Secretary of State on file in that office. It is an amendment to the articles of Yankee Oil and Gas, Incorporated, changing its name to the Yankee Companies, Inc.

* * * *

[II-95] * * * *

Thereupon, Appellant's Exhibit No. 23 was received into evidence and made a part of the record herein.

MR. DUFFY: I have marked as Appellant's Exhibit 24 a certificate from the Ohio Secretary of State stating that he has reviewed the records of this company and that office and that there is no record of any such corporation known as Rocky Mountain Energy Exchange on file in that office or ever having been filed either as an Ohio corporation for profit or not-for-profit or a foreign corporation. I move its admission into evidence.

* * * *

[II-96] Thereupon, Appellant's Exhibit No. 24 was received into evidence and made a part of the record herein.

MR. DUFFY: Appellant's Exhibit 25 is a certificate identical to Appellant's Exhibit 24, only it relates to Wellhead Enterprises, Inc. I would move its admission into evidence as well.

* * * *

Thereupon, Appellant's Exhibit No. 25 was received into evidence and made a part of the record herein.

THE EXAMINER: Mr. Duffy, anything further on behalf of the Appellant at this time?

MR. DUFFY: No. The record does reflect that all of the exhibits have been moved and admitted into evidence. If that is true, I will rest.

THE EXAMINER: Based upon my review [II-97] of my notes with respect to the exhibits, it appears that all of the Appellant's exhibits have been received into evidence.

MR. DUFFY: Thank you.

THE EXAMINER: At this time, Mr. Hubbard, you may proceed on behalf of the Tax Commissioner.

* * * *

[II-98] * * * *

THE EXAMINER: We can go on the record.

Mr. Hubbard, you may proceed with your case in chief on behalf of the Tax Commissioner and call your first witness at this time.

MR. HUBBARD: Thank you, your Honor. I'd like to call Chris Whitaker to the stand.

(Witness sworn.)

THE EXAMINER: Mr. Hubbard, you may proceed.

[II-99] Christian A. Whitaker

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUBBARD:

Q. Chris, could you state your full name for the record, please.

A. Christian A. Whitaker.

Q. And what is your work address?

A. My work address is 30 East Broad Street, State Office Tower, 21st floor.

Q. Who are you employed by?

A. I'm employed by the Ohio Department of Taxation, specifically the Division of Personal Property Taxes.

Q. How long have you been a Department of Taxation employee?

A. I have been an employee with the Department of Taxation since 1971.

Q. And what areas of the tax have you been involved in?

A. I have been involved with Ohio Revised Code 5711 dealing with personal property taxes. All of these years are in personal property taxes.

Q. Could you state what your current position is?

A. Currently I am section supervisor for central [II-100] audit of the 945 tax returns.

Q. And the 945, is that is a reference to the form number proscribed by the Tax Commissioner?

A. Yes, that's correct.

Q. What is a 945 form?

A. A Form 945 proscribed by the Tax Commissioner is a form to be filed by taxpayers holding business personal property in more than one Ohio county.

Q. And if they report property in a single county, what form do they use?

A. For business property in only one county, the proscribed form is form 920.

Q. Could you briefly describe for the Board your employment with the Department of Taxation's Personal Property Tax Section beginning from your earliest employment to the present, with approximate dates, if you can.

A. April 1971 I was employed as an agent to audit the Form 945. For two years I worked in that capacity. Then I was moved to audit review where I reviewed audits by agents from around the state. That is an audit of the Form 945, as well as the single-county Form 920.

From there I was moved to the Tax Commissioner's staff, and I coordinated the organization of a state [II-101] citation program out of each of the district offices. From there I moved to audit review for franchise tax, but that was brief, only three months.

Then I was moved again back to personal property taxes and worked in audit review, once again reviewing those personal property returns.

And then my current position as section supervisor over auditing for the State.

Q. Chris, in your day-to-day functions, do you have occasion to review personal property tax returns, Ohio personal property tax returns?

A. Oh, yes, daily. Because the agents and the supervisors under me bring returns to me with questions. We'll have some audit questions to discuss. There are many calls from tax reps and the local county auditors asking questions about returns that have been filed.

Q. Are original returns, the originals as opposed to copies of the returns, maintained at some of — are those returns maintained so that you would have access to them?

A. Yes. All of the Form 945 returns that are filed with the Tax Commissioner are maintained in a file room close to where I work. I have access to them daily.

Q. But they can be taken out by agents or by others [II-102] so they are not necessarily in the filing room, right?

A. That's correct.

Q. Okay. I am handing you what has been marked for identification as Appellee's Exhibits A and B. I'd like you to identify those documents if you can do that separately, identifying which is which.

MR. DUFFY: I'd like to hear some testimony on this witness first about Form 920s and other forms. We have heard about 945s, but the witness hasn't been handed a Form 945.

MR. HUBBARD: What he's been handed are — he can describe what those forms are.

BY MR. HUBBARD:

Q. Are you generally familiar with the forms of the Tax Commissioner — that have been proscribed by the Tax Commissioner for use by taxpayers?

A. If we are talking about Form 945, yes. I have audited the filing returns for years, and I work with them daily as well as the Form 920, single-county form.

Q. Okay. I am handing you what has been marked as Appellee's Exhibits A and B. Are they not Form 920s? Could you identify what they are?

A. Exhibit A is a Form 920-97 proscribed by the Tax Commissioner. It's tiled "Information Report of Personal Property Business Status."

[II-103] Q. Who is it for?

A. This form is for corporations licensed to do business in Ohio but who wish to declare they have no business personal property in Ohio, nor are they conducting business in Ohio.

Q. And with respect to Exhibit A, is this particular — what is the particular entity who filed this return?

A. Exhibit A is a form filed by Mobile Natural Gas, Inc. of Houston, Texas.

Q. Okay. And is there a declaration statement that's signed under the line that says "Signature of taxpayer"?

A. There is a signature under the declaration section dated April 27th, 1989.

Q. Okay. Could you for the record read the declaration that was immediately before that?

A. The declaration statement reads, "I/we declare under penalties of perjury that this return (including accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge is a true, correct and complete return and report. This corporation is not engaged in business in Ohio and does not own property in Ohio."

Q. And then there is the signature line, and it says [II-104] "Signature of taxpayer," and there is a signature here; is that correct?

A. There is a signature under that declaration.

Q. Is that the original document maintained by the Ohio Department of Taxation?

A. Yes, this is the original form maintained by the department.

Q. And there is a back to the form; is there not?

A. The back of the form is an Ohio Balance Sheet.

Q. In this case was that filled out?

A. No, nothing's been filled out. It's blank.

Q. Now, I would like you to identify what's been marked as Appellee's Exhibit B.

A. Exhibit B is a tax Form 920 proscribed by the Tax Commissioner. That form is entitled "County Return of Taxable Business Property." It's from 1988. The taxpayer's name is filed in as Mobile National Gas, Inc. of Houston, Texas.

Q. Okay. And I believe you said it was for 1988. That's the 1988 tax year?

A. That's the 1988 tax year.

Q. Okay. And when would that return be due in calendar year 1988?

A. It would be due by April 30, 1988.

Q. And then there can be extensions of time granted [II-105] for that?

A. Correct.

Q. Is this the original document?

A. Yes. That's the original document filed.

Q. I'd like to refer your attention to the second page, not counting the back side of the first page as part of the first page.

A. The page you're referring to is Form 921, Ohio Balance Sheet, also for tax year 1988.

Q. And what does that say at the very top of that?

A. Above the name of the corporation, Mobile Natural Gas, Inc. Written in hand, "The company has no assets in Ohio." The balance sheet other than that is blank showing zero values (indicating).

Q. Okay. It is blank, right? That shows zero values; is that correct?

A. Yes. On the line "total assets," someone wrote zero for zero value.

Q. And again, is that return signed under the declaration, the signature line for signature of taxpayer?

A. Yes. On the face of the 920, under the declaration on the line for signature of taxpayer is a signature dated September 8th, 1988.

Q. Now, I refer your attention to the last two pages [II-106] of this particular exhibit. Could you identify what those documents are?

A. Page 3 of this document is a letter on company letterhead of Mobile Administrative Services Company, Inc. dated September 9th, 1988. It's a letter from this company addressed to tax agent William M. Meadows, Jr.

MR. DUFFY: Excuse me. What company are you referring to? I would like the record to reflect when he says it's a letter from this company, I want to know —

MR. HUBBARD: Mobile Administrative Services Company, Inc. is what he said.

BY MR. HUBBARD:

Q. And is it captioned "Mobile National Gas, Inc. 1988 Property Tax Return"?

A. This letter from Mobile Administrative Services, Inc. makes reference to Mobile Natural Gas, Inc.'s 1988 property tax return.

Q. Okay. And is it signed by William Fowler?

* * * *

[II-107] * * * *

BY MR. HUBBARD:

Q. Just to make this as quick as possible. Is it true that William Fowler signed the letter that's part of the exhibit and also signed the declaration on the first page of the exhibit?

A. Yes. Exhibit B front page, cover page of the 920? was signed by William Fowler, as well as on page 3 which is that letter from Mobile Administrative Services Company, Inc.

Q. Now, when you say it's from them, that's what the letterhead says?

A. Because of the letterhead.

[II-108] Q. The last page, is that a compliance letter that William Meadows, Tax Agent, sent to them — sent to Mobile Natural Gas, Inc.?

A. The last page of Exhibit B is a State of Ohio Department of Taxation letter mailed by William Meadows, Tax Agent to Mobile Natural Gas, Inc.

Q. And I'd like you to identify what is Appellee's Exhibit C.

A. Exhibit C is a printout from our Corporate Account Master Display. It's dated March 29th, 1993. It identifies Mobile Natural Gas, Inc. and gives a record of the filing history of the personal property tax returns.

Q. For what period of time does it give that history?

A. It gives a history for a period of ten years.

Q. Okay. And for the Board, could you state what the significance of the numbers '85, '86, '87, '88, '89 that went across the page refer to? What they mean?

A. The line you're referring to is a line identified as year. Years 1985, '86, '87 through 1994.

Q. Is that in reference to the —

A. That's in reference to the tax year. For the year 1988, we have a record that a return was filed declaring no business in no county in Ohio also for the [II-109] year.

Q. Okay. Let me ask you a question about that.

A. Okay.

Q. You make that statement. On what basis do you make that statement? Is there some code in there that indicates that? What is the code?

A. There is a number code 97. That code designates no county, no business.

Q. What do you mean by no — you mean they are filing a report for no property, for no county?

A. That's correct.

Q. Okay. And with reference to the 97 designation, is that also the designation that appears on Appellee's Exhibit 920-97?

A. Yes.

Q. And with respect to the 1989, rather 1990, 1991, 1992 tax year returns, is it also correct that the company filed or had no property in any county in Ohio based upon their filing?

A. That's correct.

Q. Do we have the returns for 1990, 1991, and 1992 form Mobile Natural Gas, Inc. now? Does the Department of Taxation have those?

A. We have those returns.

Q. You do have those returns?

[II-110] A. Excuse me. Let me correct that statement. We have had those returns. That's how we recorded that information on the Corporate Account Master Display. Since those returns were a characterization of no property, no business in Ohio, we maintain only two years. The earlier years were destroyed.

Q. The more current years were —

A. The more current years were also.

Q. I'm sorry. Okay. You said if the — We have the 1988 and 1989 tax years here.

A. I saved those.

Q. Okay. Now, with respect to the 1990, 1991 and 1992 tax years, those returns have been destroyed?

A. Those years were destroyed.

Q. Those tax returns?

A. Those tax returns that you're making reference to were destroyed.

Q. Okay. But the record here shows in fact that there were returns filed?

A. That's correct. They were filed.

THE EXAMINER:

Excuse me, Mr. Hubbard. "Here" refers to what document?

MR. HUBBARD: Appellee's Exhibit C.

Thank you, your Honor.

THE EXAMINER: Thank you.

[II-111] BY MR. HUBBARD:

Q. And that is the Corporate Account Master Display?

A. Yes.

Q. That's how it's identified at the top.

MR. HUBBARD:

I have no further questions of this witness.

THE EXAMINER:

Thank you, Mr. Hubbard.

Mr. Duffy, cross-examination.

CROSS-EXAMINATION

BY MR. DUFFY:

Q. Who saved the '88 and '89 returns from destruction?

A. The Form 97s that we are talking about, no county, no value returns, are stored in a storage area north of Columbus. The more recent years that were filed of that Form 97 were destroyed because there wasn't enough room to save them. The information from those documents had already been recorded, so our administrator decided to destroy those.

However, I was able to retrieve the older documents, '88 and '89 from the storage warehouse before they were destroyed.

Q. Has Mobile Natural Gas, Inc. represented to you [II-112] that it doesn't have any assets anywhere?

A. Could you repeat the question?

Q. Has Mobile Natural Gas, Inc. represented to the Ohio Department of Taxation that it has no assets anywhere?

A. By the letter filed by Mr. Fowler and by the forms filed, yes.

Q. Where did he say that in his letter?

A. I believe that's Exhibit B.

Q. Does he say they have no assets in Ohio?

MR. HUBBARD: He is asking in Ohio. Would you ask the question again, John.

MR. DUFFY: Why don't you sit down and let me cross-examine the witness.

BY MR. DUFFY:

Q. Did the company say to you that they had no assets anywhere, not just Ohio, but within or without Ohio?

A. No.

Q. They have just represented to you that they have no assets in Ohio; isn't that right?

A. That's correct.

Q. With regard to assets, they are talking about tangible personal property?

A. That's correct.

[II-113] Q. Are you aware of who the taxpayer is in this case you're testifying in?

A. No, I can't say that I am.

Q. Okay. Did the Commissioner designate you to come here today?

A. The Commissioner personally did not.

Q. Who did?

A. Bart Hubbard.

Q. I see. Is Mr. Hubbard employed by the Department of Taxation?

A. I will have to say no. I understand he is employed by the Attorney General.

Q. Who in the Commissioner's office authorized you to release Mobile Natural Gas, Inc.'s property tax returns?

A. My administrator and his assistant.

Q. Who is that?

A. The administrator is Robert Dudgeon, and his assistant is Ed Givens.

Q. Did they know that Mobile Natural Gas, Inc. wasn't a party to this appeal?

A. I don't know what they know.

Q. Do you routinely release information about other taxpayers to people in the Attorney General's Office?

A. No.

[II-114] Q. Do you release it — if I called you up and asked you for a copy of Mobile Natural Gas, Inc.'s return, would you have given them to me?

A. No, unless you can give me a letter signed by authority from that company that you are representing them.

Q. Did Mr. Hubbard give you a letter like that?

A. No.

Q. With regard to Exhibit C that you have identified, that is just a summary of information of what was filed with the Commissioner's office during a particular return year; isn't that correct?

A. During 10 return years, yes.

Q. Well, this form covers that period of time, but you are not purporting to say that Mobile Natural Gas, Inc., for example, was a corporation in 1985, are you?

A. No, I am not saying that.

Q. Okay. Why is the declaration on the Form 920-97, which is Exhibit A, that the company also is not engaged in business in Ohio? What does the taxpayer file if they are engaged in business but they don't own any property in Ohio?

A. If they are engaged in business in only one county they would file a Form 920. If in business in more than one county, the Form 945.

[II-115] Q. No. I said what if they are engaged —

MR. HUBBARD: He answered the question.

THE EXAMINER: Mr. Duffy, if you would like to restate your question.

MR. DUFFY: I don't think the witness understood me.

BY MR. DUFFY:

Q. I said what do they file if they are engaged in business in Ohio but own no tangible personal property anywhere in Ohio?

A. They should file a form with the Ohio Corporate Franchise Tax Division.

Q. What is that form?

A. Well, there are a couple of different forms. I'm not sure which one you're referring to.

Q. I am asking you what property tax return would you file when you are engaged in business in Ohio but you don't have any tangible personal property in Ohio?

A. The Form 920-97 I have in front of me.

Q. But what form do you file — what property tax form do you file if you are engaged in business in Ohio but you own no tangible personal property in Ohio?

A. I said you file the Form 920, and you can file the Form 920-97.

[II-116] Q. But the Form 920-97 contains a declaration that says you're both not engaged in business and you don't own any property in Ohio.

I am asking you what form is proscribed when you are engaged in business in Ohio, but you don't own any personal property in Ohio?

A. Form 920, as I said before, as well as Form 945. You can be in business in Ohio but have no personal property, and there is a declaration statement there.

Q. But what county do you file the return with then?

A. Whatever county it is you would be doing business in.

Q. You don't file a 945 with every county auditor that you are engage in business in, do you, Mr. Whitaker?

A. No. Nor did I say you do. You file the Form 945 with the Tax Commissioner.

Q. But you're saying that you have got to file, even though you own no taxable personal property in Ohio, you have to file a 920 with the county auditor for the county in which you're engaged in business?

A. If it is only one county, that's correct.

Q. What if it's more than one county?

A. Then it would be the Form 945.

Q. Why don't all taxpayers file their 945 with the [II-117] county auditor of every county in which they engage in business?

A. Because if they have business in just that one County, there is no need to have the Form 945 where you can list other costs if they are doing business in more than one county.

Q. You don't file a 945 based on where you're doing business. You only file a 945 based on where you have tangible personal property, don't you?

A. Right.

Q. Okay. Now, what if a taxpayer has no tangible personal property —

MR. HUBBARD: Your Honor, he's asked this several times. It's been answered several times.

MR. DUFFY: Is hasn't either.

THE EXAMINER: To the extent there is an objection, I will overrule it. However, I would encourage Mr. Duffy to phrase his question if it's unclear in a manner that the witness may be capable of understanding it.

BY MR. DUFFY:

Q. If a taxpayer has tangible personal property in Summit County, Cuyahoga County, and Hamilton County but has offices in those Lucas County and Columbiana [II-118] County, what county does he file a return with?

A. Every county that this corporation has tangible personal property in would be reported on the Form 945. That form would be filed with the Tax Commissioner. Does that answer the question?

Q. Okay. And it wouldn't be filed with any county auditor?

A. It would not be filed with any county auditor.

Q. Okay. And would it list all of the places where the person did business?

A. It would list all places where the taxpayer has tangible personal property.

Q. Right.

A. Right.

Q. Now, what if we have our taxpayer, and it engages in business in all five of those counties. It actually has a business

location, but owns no tangible personal property in any of those locations.

A. If the taxpayer — I have to make an example to see if I follow you. A salesperson who drove to another county to sell —

Q. I said they have an office in each of the five counties, but they don't own any tangible personal property themselves?

A. Which tells me they must be leasing or using [II-119] someone else's tangible personal property.

Q. Are you saying that you have to own or lease tangible personal property to engage in business in Ohio?

A. If on the tax returns that we have been discussing, the Form 920 and the Form 945, there is a place on that return for the business corporation to list property that's leased from others.

So if a business has an office in a county but owns no tangible personal property, they should list on that return who they are leasing that property from.

Q. But you're assuming that a company is leasing the property. What if they are not? What if they don't own or lease any tangible personal property?

MR. HUBBARD: What is the question?

BY MR. DUFFY:

Q. What return do they file?

A. Well, they still file the same returns we are talking about.

Q. In other words, in that situation the company files a 945 with the Tax Commissioner?

A. (Witness nodded.)

Q. And what business —

THE EXAMINER: Excuse me. For purposes of the record, Mr. Whitaker, if you could [II-120] indicate orally for the record either yes or no.

MR. HUBBARD: Instead of shaking your head, Chris, if you could just say yes, if it's yes.

BY MR. DUFFY:

Q. You didn't audibly answer my last question.

A. I wasn't aware that I answered the question. I'm sorry.

Q. You nodded your head, and the record will reflect that you nodded your head.

THE EXAMINER: Could you repeat Mr. Duffy's question prior to the last "yes." (Thereupon, the question was read.)

MR. DUFFY: Do you want an audible answer to the question?

THE EXAMINER: Please.

MR. DUFFY: Would you like the reporter to read back the last three questions. (Thereupon, the material was read.)

THE WITNESS: Yes.

BY MR. DUFFY:

Q. I said to you assuming they own or lease no tangible personal property, but they have a place of business in five different counties, you said they still file the 945 with the Commissioner. The question [II-121] I started to ask you then is what business location do they list in the return?

A. They list the location where they are using tangible personal property they own or they lease from another.

Q. My example was they own or lease no tangible personal property. Take that as a given.

A. They are still filing a return listing that they have business. If they have an office in, for example, Lorain County, they own no tangible personal property, they are not leasing the property, they will not be listing any property then. However, during the audit of that tax return, we'll be looking into that to find out if someone should be filing property for that county.

Q. That's all fine, but what business location do they list in the return, if they don't own it or lease any tangible personal property?

A. Are you telling me in your example that they own no property in Ohio in any county?

Q. Um-hum.

A. Nor are they leasing property in Ohio?

Q. That's right. That was my example.

A. Of course, they will still file the return, and they will give us this information.

[II-122] Q. What return will they file?

A. They could be filing either a 920-97, or they could be filing —

Q. Because the 920-97 requires they sign the declarations that they aren't engaged in business?

A. That's correct. But they are engaged in business so they will file a Form 920.

Q. With whom?

* * * *

[II-125] * * * *

THE EXAMINER: * * * Does there exist a form which a corporation could file that indicates that it is engaged in business in Ohio but does not own property in Ohio?

THE WITNESS: There is no special form for the purpose you mention concerning the personal property tax division, no.

THE EXAMINER: Thank you, Mr. Whitaker.

MR. HUBBARD: Your Honor, if I may, I have a clarificatory question. Are you meaning a special form?

THE EXAMINER: Is there a form stemming from 920 —

[II-126] MR. HUBBARD: I believe it's his testimony, as it has been, that you would file a Form 920 if you were doing business in a single county, Form 945 if you were doing business in more than one county.

THE EXAMINER: You may clarify my question on redirect.

MR. HUBBARD: Your Honor, are you asking are there specific forms or any form at all? He answered there is no specific form. Are you asking if there is a general form that could be filed, you know, a general form that can be filed, just so I am clear on your question.

THE EXAMINER: Mr. Whitaker, is there a form similar to 920-97 marked as Appellee's Exhibit A in which a corporation who is engaged in business in Ohio but does not own any property in Ohio can file to report its personal property business status within the state?

THE WITNESS: If a company is doing business in a county, but owns no personal property in that county, that company is to file a Form 920 with that county.

If the company is doing business in more than one county but owns no personal property in those counties, that company is to file Form 945 with the Tax [II-127] Commissioner.

THE EXAMINER: Mr. Duffy.

MR. DUFFY: Thank you.

BY MR. DUFFY:

Q. What does it list as the places of business in that form and where does it list it?

A. On the Form 945 under the cover there is a place to list location of business. On the Form 920, on the face of the 920 form, there is a place to list the place of business, the schedules underneath that which show a zero value.

Q. What schedule are you referring to?

A. The schedule I am referring to on the face of the Form 920 are schedule 2, schedule 3, schedule 3-A, and schedule 4.

Q. Now, Mr. Whitaker, aren't those places where you have property?

A. Or do not have property, whichever the case may be.

MR. HUBBARD: Your Honor, for clarification purposes, we are referring to Exhibit B, the first page.

BY MR. DUFFY:

Q. You're seriously telling me you that you expect somebody to list on schedules 2 and 3 and 4 all of the [II-128] places where they don't have machinery and equipment, furniture and fixtures and inventory?

A. Companies licensed to do business in Ohio are required to file with the Tax Commissioner or the Tax Commissioner's representative — for this purpose the local county auditors a return — so they can designate and declare whether they are holding taxable tangible personal property or not, as long as they do business in Ohio.

Q. Okay. I am going to hand you a copy of Section 711.02. Would you read the first sentence there to me, please.

A. 5711.02 Annual Returns, Supplying of Blanks. It reads, "Except as otherwise provided by Section 5711.13 of the Revised Code, each taxpayer shall make a return annually to the county auditor of each county in which any taxable property which the taxpayer must return is required by this Chapter to be listed and shall truly and correctly list therein all taxable property so required to be listed including property exempt under division (C)(3) of the Section 5709.01 of the Revised Code.

Q. Where does it say in there you file a return with the county auditor of the county where you are engaged in business?

[II-129] A. As you just stated to me, it doesn't. It isn't worded that way, no.

Q. I'm going to hand you Section 5711.13 of the Revised Code. What does the first sentence of that section say?

A. "A taxpayer having taxable property required to be listed in more than one county shall make a combined return to the Tax Commissioner listing all its taxable property in the state in conformity with Section 711.01 to 5711.36 of the Revised Code. A taxpayer shall make combined return assessment certifications to the treasure of state, a taxpayer having taxable property required to be listed in more than one county shall make a combined return to the Tax Commissioner listing all its taxable property in this state in conformity with Sections 5711.01 to 5711.36."

Q. Where does it say in there it has to also identify the places it is engaged in business?

A. In that paragraph, it doesn't say that.

Q. Where does it say it in Chapter 5711 that you have to identify the places in the State of Ohio where you're engaged in business?

A. I don't know of a place in 5711 where it states that.

Q. Okay.

[II-130] MR. HUBBARD: Your Honor, to the extent that this witness is testifying from his personal knowledge, I have no objection, but I would note that as a legal matter he is not an attorney and his functions aren't necessarily to have the Revised Code memorized or be able to cite its provisions or what authority there may be one way or the other on that.

THE EXAMINER: You made your notation for purposes of the record.

MR. DUFFY: Thank you. I'm sorry it took this long. I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard, redirect.

MR. HUBBARD: No, your honor.

THE EXAMINER: Mr. Whitaker, you may step down. Thank you very much. (Witness excused.)

THE EXAMINER: Let's go off the record for just a moment.

(Luncheon recess taken.)

[II-131] Friday Afternoon Session May 14, 1993

THE EXAMINER: Back on the record. Mr. Hubbard, you may proceed with your case in chief. You may call your next witness.

MR. HUBBARD: We would call Steve Jaffee to the stand, please.

(Witness sworn.)

THE EXAMINER: Mr. Hubbard, you may proceed.

MR. DUFFY: Before we begin, I take it the additional people that are in the room are not going to testify in the proceeding here?

MR. HUBBARD: That's correct.

MR. DUFFY: Okay.

[II-132] Steve Jaffee

being duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUBBARD:

Q. Mr. Jaffee, could you state your name for the record and spell your last name, please.

A. My name is Steve Jaffee, J-a-f-f-e-e.

Q. Could you inform the Board briefly of what your educational background is?

A. I have a Bachelor of Arts in English from McGill University. I have a Master's in Business Administration from Northeastern University.

Q. Could you outline your employment history?

A. I began working in 1980 with Price Waterhouse in Boston, Massachusetts and worked there until March of 83 when I joined an entity called Yankee Resources, Inc. and moved out to Ohio with that same entity in 84 and have been with that entity or its successor entities since then.

Q. Is Access Energy the successor to Yankee Resources?

A. Yes.

Q. What are your duties currently for Access Energy?

A. As Executive Vice President of Access Energy, I [II-133] am currently responsible for the administrative services group which includes the operation management for purchases and sales of natural gas, including finance, accounting, human resources and information systems.

Q. How long have you been in that role?

A. I've been in that role or a similar role for about ten years.

Q. In your capacity in that role for Access Energy and prior to that Yankee Resources, and focusing on the audit period here, which is from roughly October 1986 through December of 1990, were you responsible for overseeing the tax reporting functions?

A. Yes.

Q. During that time, and specifically focusing on the period from October of '86 through 1990, did Yankee Resources file any public utility tax returns, be they public utility, property or gross receipts tax returns?

* * * *

[II-135] * * * *

THE WITNESS: No, they did not.

BY MR. HUBBARD:

Q. Were they required by the Department of Taxation Public Utility Division to do so?

* * * *

[II-136] * * * *

THE WITNESS: To my knowledge there was no requirement.

BY MR. HUBBARD:

Q. Did Yankee Resources and Access Energy file general purpose personal property tax returns as opposed to public utility property tax returns in Ohio?

* * * *

Q. And has that practice continued to the current time?

A. Yes, it has.

* * * *

[II-138] * * * *

BY MR. HUBBARD:

Q. Did Yankee Resources, now Access Energy file Ohio corporate franchise tax returns?

A. Yes.

Q. Could you describe the business of Yankee Resources, Inc. during the assessment period? And again the assessment period runs from roughly October of 1986 through 1990.

A. During that period, Yankee Resources was engaged in the business of natural gas marketing. In that effort, we would have arranged for the identification of natural gas supplies and for the transportation of those supplies to various customers who would typically be industrial end users.

Q. When was Yankee Resources formed?

A. Yankee Resources was formed in 1982.

Q. And when did Yankee Resources become Access Energy?

A. Access Energy was formed in 1988.

Q. When I refer to Yankee Resources or Access Energy, do you understand that I am referring to the same entity?

A. Yes, that's my assumption.

Q. I mean for purposes of these questions, if the [II-139] answer is different with respect to Yankee Resources as opposed to Access Energy, do you understand that you are to indicate the difference?

A. Yes.

Q. Now, you mentioned that Yankee Resources and Access Energy are marketers of natural gas. What does that entail? What does that involve?

A. Well, as an independent marketer, we are responsible for finding cost effective supplies for our customers. And in some cases, for arranging for the transportation of those supplies to the customer.

Q. What makes you independent?

A. Well, we aren't affiliated with any interstate pipelines or local distribution companies or producers. We are independent in that

sense. There are people that are engaged in the business of natural gas marketing who do have an affiliation.

Q. Did you have customers in Ohio during the audit period?

A. Yes.

Q. Just a round number of customers that you might have had then.

A. In Ohio, it would have been roughly between 80 and 90 customers.

Q. And what type of companies would be customers?

[II-140] A. Steel manufacturers, car manufacturers, people that are using natural gas in some sort of manufacturing process.

Q. There's been some reference in the hearing to Yankee Gas Company as opposed to Yankee Resources or Access. What is the relationship of Yankee Gas to Yankee Resources?

A. In 1958, our parent company, The Yankee Companies, formed Yankee Gas as an intermediate holding company. The Yankee Gas Company had three wholly-owned subsidiaries; one of those was Yankee Resources.

Q. Could you describe the circumstances and changes in the natural gas industry that led to the creation of private gas marketing companies such as Access Energy and Yankee Resources?

A. There was a period in the late '70's and early '85's where there were curtailments on supplies and shortages of natural gas. And Ohio was one of the first areas where programs were established whereby industrial end users who couldn't buy enough natural gas were able to arrange with producers to buy supplies and have them delivered to their facilities. It was called the Self-Help Program.

And as a result of that beginning effort, an industry was formed because it was possible to arrange [141] for the purchase

of those supplies at prices that were lower than those being offered by local distribution companies.

Q. Has this way of selling gas become more popular as time has gone on?

A. I think the amount of gas that's transported by independent means or by people like Access Energy has grown from a very small percentage in 1982 to probably 80 or 90 percent of the gas that's consumed by industrial users.

Q. How many companies were engaged in marketing gas like Access Energy does?

A. I am not sure of the exact number, but there are directories that have at least 200 to 300 companies listed.

* * * *

[II-142] * * * *

Q. Do you have information other than the directories that you're testifying to in estimating the amount?

A. I have knowledge that there are hundreds of companies engaged in the purchase and sale of natural gas.

Q. And is that just from your general experience in the industry?

A. Yes.

Q. Access Energy, and before that Yankee Resources, were they relatively new in this market or are they one of the more established companies?

MR. DUFFY: Objection, leading.

[II-143] MR. HUBBARD: I am trying to make it not leading, but that doesn't suggest the answer.

MR. DUFFY: You want him to give you one or the other answers.

MR. HUBBARD: Or something in between.

THE EXAMINER: Why don't you attempt to rephrase your question.

BY MR. HUBBARD:

Q. * * * The industry you have testified came into being essentially in 1980; is that correct?

A. Very early 1980, yes.

Q. And Access Energy started, or then known as Yankee Resources, was formed when?

A. In 1982. Access Energy is one of the oldest, if not the oldest independent natural gas marketer.

Q. Who does Access provide its services to?

A. Access provides services to selected industrial users of natural gas. And in some cases, sells natural gas to local distribution companies.

Q. Does Access provide natural — sell natural gas to customers outside Ohio as well as in Ohio?

A. Yes, it does.

Q. How many customers does Access have nationally?

[II-144] A. Access has approximately 500 industrial customers throughout 34 states in the U.S.

Q. How does natural gas get delivered to the customers, the end user customers?

A. Natural gas is typically purchased into a receipt point at a receiving pipeline, and that pipeline would then transport the gas to a local distribution company who would then redeliver that gas to the industrial end user.

Q. Does Access produce its own gas?

A. No, it does not.

Q. So it does purchase gas from producers?

A. Access purchases gas from many different producers.

Q. Does Access own or control any assets which are used for the distribution of natural gas to consumers?

A. No, it does not.

Q. Does Access own or control any physical assets over which the gas is transported or delivered to consumers?

A. No.

Q. Are you aware that natural gas companies are subject to regulations as public utilities in Ohio?

A. Yes.

Q. Is Access Energy, prior to that Yankee Resources, [II-145] Inc., subject to regulations by the Public Utilities Commission in Ohio?

* * * *

THE WITNESS: To my knowledge, Access Energy and Yankee Resources are or were not subject to regulations.

BY MR. HUBBARD:

Q. Have they ever been subject to regulation by the PUCO?

A. Not to my knowledge.

* * * *

[II-146] * * * *

Thereupon, Appellee's Exhibits D and E were marked for purposes of identification.

THE EXAMINER: Back on the record.

BY MR. HUBBARD:

Q. I will hand you what's been marked as Appellee's Exhibit D. The first page is a copy of a certification. I'd like you to identify what the rest of the document is, if you can.

A. This document represents a request made by counsel for Yankee Resources for an application for relief from jurisdiction to specify that Access is not a public utility pursuant to the appropriate sections.

Q. And I am handing you what's been marked as Appellee's Exhibit E, the first page of which is a copy of the certification statement from the Public Utilities Commission. Could you identify the remainder of that document?

A. This document is an order by the Public Utilities Commission of Ohio stating that the Commission's opinion is —

* * * *

[II-149] * * * *

THE EXAMINER: If the witness can testify to that effect, I will let it in. If he can identify it from his knowledge.

BY MR. HUBBARD:

Q. Mr. Jaffee, were you identifying these documents — Are you personally familiar with these documents?

A. Yes, I am.

Q. And how did you gain that familiarity with these documents?

A. From being involved in the process of asking for them to be prepared, and then having knowledge that they had been received by the company.

Q. In fact, are you very much aware of these documents, and are these documents relied upon you by, Access Energy, today?

A. Yes.

* * * *

[II-150] * * * *

Q. Referring to Exhibit E, is there an ordering paragraph to that document?

A. Yes.

Q. And is that paragraph 7?

A. Yes, it is.

Q. Now, have you reviewed both Appellee's D and E?

A. Yes, I have.

Q. Are those statements about Yankee Resources' operations true of Access Energy today, and were they true of Yankee Resources and Access Energy during the audit period involved here?

A. Yes.

Q. Okay. Exhibit D is the application that was made to the Public utilities Commission of Ohio by Yankee Resources, Inc., correct?

A. Yes, it is.

Q. And Exhibit E is the entry to the PUCO that was the result of that application; is that right?

A. Yes, it is.

Q. Is that the entry to the PUCO that we have identified as Exhibit E still in force and effect with respect to Access Energy today?

* * * *

[II-151] * * * *

THE WITNESS: It's my understanding that this document is, in fact, and I know of no event or transaction that's transpired since it was issued that would cause it not to be intact.

Q. In other words, the facts that are recited in the order which form the Public Utilities Commission's basis for determining that Yankee Resources and now Access Energy are not natural gas

companies for PUCO purposes is still the same, the factual basis is still the same?

A. Yes.

Q. Have you ever been advised by the PUCO, by "you," I mean Access Energy or Yankee Resources, that the order is not in effect?

[II-152] A. No, we have not.

Q. How does Access determine who it will provide services to?

A. Access routinely identifies industrial end users that are located in areas which it deems it can serve on an economically attractive basis and then selectively contacts those customers and seeks to arrange for the purchase and sale of natural gas for that customer.

Q. Does Access Energy, and previous to that Yankee Resources, own any of its own transmission or distribution facilities to transport the gas in Ohio?

A. No.

Q. All the gas that you sell then moves through the transportation facilities owned by pipeline companies and public utilities?

A. Yes.

Q. Do you choose your customers?

A. Well, we identify people that we believe we can economically serve. We aren't always able to reach agreement on terms and conditions.

Q. But you do not hold yourself out to the general public?

A. No, we do not.

Q. You negotiate contracts separately for each [II-153] customer?

A. Yes. The terms and conditions are negotiated on a case-by-case basis.

Q. Can any consumer of natural gas require Access to enter into a contract with that particular individual or consumer?

A. No.

Q. Is Access required to offer its service to any particular — or I'm sorry, to a general or indefinite public?

A. No, it is not.

Q. Does Access in any way hold itself out as providing services to a general or indefinite public?

A. No, it does not.

Q. Is Access owned by, affiliated with or under the control of a regulated public utility?

A. No, it is not.

Q. Is Access owned by a person or company which makes its services available generally and indiscriminately to the public?

A. No.

Q. Is Access granted any rights or franchise by state, city or local government units to operate its business?

A. No.

[II-154] Q. Is the price charged by Access for its services fixed or controlled by any governmental units?

A. No, they are not.

Q. Is Access licensed by any governmental unit in the areas within which Access can operate?

A. No.

Q. Must Access pay any fees to any governmental unit to provide services to its customers?

A. Could you repeat that question, please.

Q. Sure. Must Access pay any fees to any governmental unit to provide services to its customers?

A. No.

Q. Can access or its customers terminate contracts without prior approval of any governmental unit?

A. Yes.

Q. Does any governmental unit restrict the territory in which Access operates?

A. No.

Q. Can Access use the power of eminent domain over any property?

A. No, it cannot.

Q. Has Access been granted any special rights to request the State of Ohio or any other governmental unit to exercise police power to aid Access in the operation of its business?

[II-155] A. No.

Q. The questions I have asked you with respect to Access, was that also true of Yankee Resources?

A. Yes, it is.

Q. Is Access required to pay a fee to the PUCO to cover the PUCO's expenses?

A. No.

Q. Is Access required to file reports with the PUCO under Section 905.14 of the Revised Code in the annual report?

A. No.

Q. Is it required to subject its system of accounts to those provided by the PUCO?

A. No.

* * * *

[II-156] * * * *

Q. Is Access required\to keep the depreciation accounts pursuant to Section 905.18 of the Revised Code?

A. No.

Q. Is it required to final tariffs pursuant to Revised Code Section 905.19?

A. No.

Q. Is it required to file rates that are then subject to approval of the Public Utilities Commission of Ohio?

A. No.

Q. Is it required, pursuant to Revised Code Section 905.20 and .21 to file an application to abandon services and facilities when it does, in fact, abandon facilities?

A. We don't own any facilities.

Q. Is Access required to file any purchase gas adjustment clause pursuant to Section 904.30(2) of the Revised Code?

A. No.

MR. HUBBARD: I have no further questions of the witness at this time, your Honor.

THE EXAMINER: Mr. Duffy, [II-157] cross-examination.

CROSS-EXAMINATION

BY MR. DUFFY:

Q. Mr. Jaffee, you said that Access Energy, Inc. is a successor to Yankee Resources, Inc.; is that correct?

A. Access is a successor.

Q. Could you explain to me how they became a successor corporation?

A. In 1988, the management of Yankee Resources, Inc. formed Access Energy Corporation along with another entity called Yankee Gas Acquisition and essentially purchased the assets of Yankee Resources, Inc. and substantially all of the liabilities.

Q. Who did; the acquisition company or Yankee or Access Energy Corporation?

A. The acquisition company actually purchased the assets, and it was renamed Access Energy Corporation.

Q. What happened back in 1982 that allowed your company, and by that I am referring either to Yankee Resources, Inc. or Access Energy Corporation, what happened back in 1982 that allowed your company to get into the marketing of natural gas to end users?

A. It was a supply and demand imbalance which existed and caused shortages. As a result, it became [II-158] attractive for industrial users who wanted to secure supplies to go directly to a third party to supply those, to receive those supplies.

As a result the regulations, the interstate pipelines and local distribution companies began to shift over time allowing for third-party transportation. And it was that allowance of third-party transportation that allowed Yankee Resources and Access Energy to do what they do.

Q. So it's true you couldn't have gotten into the business without the changes in the regulatory environment regarding the transportation of gas to end users, right?

A. That's true.

Q. You indicated that prior to that change that end users had to buy their gas from local distribution companies. It is true that end users could also buy gas from pipeline companies during that time, couldn't they?

A. I don't think that was true in all of the — in very many cases. I believe the — I know that there are instances where certain industrial users had direct connections with interstate pipelines, but that's the exception as opposed to the rule.

Q. But they were permitted to do it if they wanted [II-159] to?

A. They were permitted to do it if they were connected, not if they wanted to. They had to be directly connected to a pipeline where there was no longer a distribution company to provide service.

Q. You characterized Yankee Resources and Access Energy as an independent marketer, you said because they weren't affiliated with any other companies essentially who produce gas or sold it. Are there companies that are engaged in the same business that you are that aren't independent in the way that you just described it?

A. Yes.

Q. Could you name some?

A. As an example, Tenn Gas Co., which is a gas marketing company that is not independent because they are affiliated with Tennessee.

Q. How about Mobile Natural Gas Company, Mobile Natural Gas, Inc.?

A. I would describe Mobile as affiliated with Mobile Oil, a major producer.

Q. So it's not an independent marketer then?

A. I would not characterize it as an independent marketer.

Q. During your testimony, you talked about providing [II-160] service to end users. When you were talking about your customers, you referred to your local distribution customers, you talked about making sales to them. What is the difference?

A. I'm not sure I understand the question.

MR. HUBBARD: Your Honor, could we have that question repeated, please.

THE EXAMINER: Please repeat the question.

BY MR. DUFFY:

Q. You characterized what you were doing for your customers as the provision of services. You were talking about selling gas to end users, industrial customers or end users, but maybe I misunderstood you. I thought you also said that you sold natural gas to local distribution companies as well?

A. We did sell some gas to local distribution companies.

Q. And you characterized that as sales, not as services. What is the difference?

A. I guess my definition of what we do is, and I didn't mean to use a strict definition, but whether we are selling gas to a local distribution company or industrial end users, we are selling gas and providing a service to them.

[II-161] Q. Okay. So the nature of your business in terms of whether a customer is a local distribution company or an industrial end user, what you do for both of them is essentially the same —

A. Yes.

Q. — as a customer?

A. We arrange for the purchase and sale.

Q. Is it correct that you own no, what you characterize as transportation or distribution facilities anywhere either in Ohio or outside of Ohio, because you were very careful to say you didn't have any in Ohio?

A. Well, let me make sure I understand what type of facility you're referring to because there were — during the audit period, we did own some assets. I would not characterize those assets as

distribution facilities or as transmission facilities, but rather gathering facilities.

Q. What is a gathering facility?

A. A gathering facility is a very small diameter pipeline that would connect to various wellheads and gather gas for the ultimate delivery to an interstate pipeline.

Q. Does one of your lines actually feed into the interstate pipeline?

[II-162] MR. HUBBARD: Objection as to the time period of the question. Are you asking — is that a question intended for currently, presently?

MR. DUFFY: I said during the audit period.

MR. HUBBARD: He said "does." Are you asking presently or during the audit period?

MR. DUFFY: I was cross-examining him about a statement that he made in response to one of your questions. He was very careful to say that, during the audit period, they owned no transportation or distribution facility in Ohio.

I was trying to find out whether he was making a distinction between in Ohio and outside of Ohio facilities. When he answered that question, he proceeded to say that — tell me what kind of pipes they have to move gas. My questions was is that connected directly to an interstate pipeline.

MR. HUBBARD: Is it or was it during the audit period or some portion of the audit period?

MR. DUFFY: Well, is it or was it when they had it.

MR. HUBBARD: All right. I was just asking for a clarification as to what you're [II-163] asking.

MR. DUFFY: It's the witness I am asking the question to, not you. I wish that you would let him answer the question.

MR. HUBBARD: The question was ambiguous as you phrased it. We were talking about the audit period and then you switched to the current tense.

MR. DUFFY: You cannot say that. The witness can say that if he doesn't understand the, question, but you can't.

MR. HUBBARD: I felt that it was an ambiguous question based on a sequence of questions. I object to it on that basis.

THE EXAMINER: Mr. Duffy, if you can indicate to the witness, if the witness is unclear as to the period which you're referring, I would request that you do so. If the witness understands the period to which your referring, he may so testify.

BY MR. DUFFY:

Q. When did you own these facilities that you are now talking about, Mr. Jaffee?

A. The facilities to which I referred would have been owned between 1985 and 1988.

Q. Did you misunderstand my last question?

[II-164] A. I assumed that you were referring to the audit period.

Q. I am talking about now my last question. Were these facilities connected to an interstate pipeline? If you want to distinguish whether they were or were not during portions of the audit period, that's fine. But I am asking you that during the entire period that you owned them.

A. During the entire period, they were not connected to interstate pipelines.

Q. What are they connected to?

A. They were connected to intrastate pipelines in Texas and Oklahoma.

Q. Who owned those pipelines?

A. The intrastate pipelines?

Q. Yes.

A. As an example, Houston Pipeline, Houston Natural Gas.

Q. Was this gas that you produced?

A. No.

Q. Who did?

A. Various producers.

Q. And then you just owned the facility to separate it and to gather it and dump it into an intrastate pipeline?

[II-165] A. I'm not sure about any separation, but for purposes of gathering, yes.

MR. HUBBARD: Objection. Was that an interstate pipeline or intra?

MR. DUFFY: Intra.

MR. HUBBARD: Intra.

MR. DUFFY: Yes.

THE EXAMINER: Objection withdrawn?

MR. HUBBARD: Yeah. If in fact it's clear in the record it was "intrastate."

THE EXAMINER: That's what I heard.

MR. HUBBARD: Okay.

BY MR. DUFFY:

Q. Are you saying then that your gas gathering line really consisted of a network of pipes that gathered natural gas from a battery of separators owned by independent producers? Is that what you're describing down in Texas?

A. I am saying that we owned some gathering lines. I'm not sure whether there was any separation on those lines. But we

gathered gas from various producers and delivered that gas into intrastate pipelines.

Q. I know that one terminus of your gathering line was the intrastate pipeline. Where is the beginning point of your line?

[II-166] A. The beginning point might have been at the wellhead, might have been a little bit beyond. I'm not sure.

Q. It would hook up then to some piece of pipeline belonging to another producer?

A. Yes.

Q. Or a producer, not another producer?

A. Yes.

Q. During the audit period did you sell any natural gas to General Motors in the State of Ohio?

A. When you say "sell," I want to make sure I understand whether you're talking about technical sale at the point of delivery prior to where title was transferred, or did we sell gas to a facility in Ohio.

Q. Let me ask you this. Did you report your G.M. sales as Ohio sales for franchise tax purposes?

A. I'm not sure. I'd have to look.

Q. Do you want to do that?

A. I wouldn't be able to answer you right now.

Q. Do you have the returns here today that you referenced that you filed?

A. They are not with me.

Q. Wouldn't they be the best evidence of whether you filed returns in Ohio or not?

A. They would.

[II-167] Q. Did you personally file them with the state?

A. No.

Q. Who did?

A. They would have been filed by our auditors. During the audit period that would have been Arthur Young up until 1988, and then Peat Marwick thereafter.

Q. Did you ever see them?

A. Yes.

Q. Did you sign them?

A. I signed some of them. I'm not sure if I signed all of them.

Q. You have been talking about your selling gas here during a lot of your testimony, and now you're asking me whether I am using "selling" or "sale" in the technical sense. What sense were you using it during your testimony?

A. As part of the provision of service to our customers.

Q. Well, did you arrange for the transportation of the natural gas that you sell?

A. In some cases we do.

Q. That's part of your overall services?

A. It can be, yes.

Q. Did you do that for General Motors Corporation?

A. We did not do that for General Motors.

[II-168] Q. So when did your service for them end with regard to the sale of natural gas?

A. It would have ended when we delivered the gas into a receiving pipeline.

Q. And did you do that in Ohio?

A. No.

Q. So when I ask you if you sold any natural gas to General Motors in Ohio during the audit period, how would you answer that question in the context of your testimony here today?

A. I would answer no.

MR. HUBBARD: Your Honor, I believe it's clear he is responding in the sense where title passes.

MR. DUFFY: I don't think that requires — I do not think that it requires a comment from you, Bart. You can ask him questions.

MR. HUBBARD: The thing is you self-define these questions, and then three or four questions later, as you define the term, he answers it.

I want it clear in the record as to what he is talking about.

MR. DUFFY: I didn't either. I asked him to define the term.

MR. HUBBARD: And he asked you.

[II-169] THE EXAMINER: It appears to me to be the purpose of cross-examination to clarify on redirect.

MR. HUBBARD: Fine.

BY MR. DUFFY:

Q. Mr. Jaffee, did you have to go into the Public Utilities Commission and request any kind of a ruling from the Commission in order to sell gas to General Motors down in Texas?

A. No.

Q. Mr. Jaffee, I'm going to hand you a document which was marked previously in this case as Appellant's Exhibit-A and ask you if you have ever seen that document before?

A. Yes, I have.

Q. What is your understanding of what that document is?

A. This is a contract which — gas purchase agreement which governs the purchase and sale of natural gas by and between Yankee Resources and General Motors Corporation.

Q. What were the points of delivery for the natural gas sold to General Motors under that agreement?

A. The points of delivery are the initial receiving pipeline of Texas Gas Transmission.

[II-170] Q. Is that the only place?

A. There are several Texas Gas Transmission Corporation receipt points.

Q. Where were they located?

A. One is located in Louisiana; Florida. Four of them were in Louisiana.

Q. Has your company filed tax returns in Louisiana?

A. I believe we do.

Q. What kind of returns do you file down there?

A. I believe we file sales tax returns in Louisiana.

Q. What other types of returns?

A. I'm not sure if there are any. I'd have to review our — we file returns in a lot of different states. We do business in 34 states. Some require filing of returns, some don't.

Q. What about in Texas?

A. I'm not sure of the Texas requirements without looking.

Q. Why don't you charge General Motors Corporation sales tax on the gas that was delivered to them in Louisiana?

A. I don't know. I'm not 100 percent sure.

MR. DUFFY: I don't have any further questions of the witness.

THE EXAMINER: Mr. Hubbard, [II-171] redirect.

REDIRECT EXAMINATION

BY MR. HUBBARD:

Q. Mr. Jaffee, does Access Energy, and before that Yankee Resources, sell gas to its customers where title to the gas passes in Ohio? Passes from Yankee Resources or Access Energy to the customers in Ohio?

A. Yes.

Q. That was true during the audit period?

A. Yes.

Q. To put that more concretely, was the source of the gas somewhere in Ohio, the gas that was sold to the customer?

A. Yes.

Q. Is that how that arose? Okay. Depending upon the particular contracts that Access has, does title to the gas pass at different points, or is it always at the initial receiving point?

A. It's typically at the initial receiving point.

Q. Are there exceptions to that?

A. Yeah. There can be exceptions. An example would be where we happen to hold a transportation agreement on a receiving pipeline where we would act as shipper.

Q. That wasn't the case with General Motors, [II-172] however; is that right?

A. That's correct.

Q. With respect to the General Motors contract that's been identified as Exhibit-A, the contract itself?

A. (Witness nodded.)

Q. Okay. In respect to that contract, Access sold gas to General Motors; is that correct?

A. Yes.

Q. Is it also correct that Access did not own or physically control any of the facilities over which that gas was transported or delivered to General Motors?

A. That is correct.

MR. HUBBARD: I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Hubbard. Mr. Duffy, anything further?

RECROSS-EXAMINATION

BY MR. DUFFY:

Q. The gas that was sold to General Motors Corporation, or Appellant's Exhibit-A, you are saying that none of it went through any of the [II-173] facilities that you said you owned in Texas.

A. That's correct.

Q. Were those just different wells; is that what you're saying?

A. Well, the receipt points in-A were in Louisiana.

Q. I thought you said there was one in Texas.

A. Texas Gas Transmission was the pipeline. I don't think there was one in Texas.

Q. I'm sorry. I thought you said there was one point of delivery in Texas?

A. I would have to look at the contract to see if there were. (Pause.) There are four delivery points listed in the initial receiving pipeline, and all four of those points are in Louisiana.

Q. You're looking at Exhibit A-1 to the agreement?

A. Page 28. That's correct.

MR. DUFFY: Thank you. I have no further questions.

THE EXAMINER: Mr. Hubbard, did you have anything further?

MR. HUBBARD: Nothing further of this witness.

[II-174] THE EXAMINER: Thank you, Mr. Jaffee. You may step down. Thank you very much. (Witness excused.)

* * * *

[II-178] * * * *

Thereupon, Appellee's Exhibits F and G were marked for purposes of identification and were received into evidence and made a part of the record herein.

THE EXAMINER: Mr. Hubbard, you may call your next witness.

MR. HUBBARD: Your Honor, we would call Mr. Peters to the stand.

(Witness sworn.)

THE EXAMINER: Thank you. You may be seated.

* * * *

[II-180] William T. Peters

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUBBARD:

Q. Bill, would you state your full name for the record.

A. William Thomas Peters.

Q. What is your work address?

A. My work address is 30 East Broad Street, Rhodes State Office Tower, 21st floor, Columbus, Ohio.

Q. By whom are you employed?

A. The Ohio Department of Taxation.

Q. What is your current position?

A. I am currently a Tax Commissioner Agent Supervisor.

Q. And what area of law do you work in?

A. I work in the Public Utility Tax Section.

Q. How long have you held your current position?

A. I have currently been a supervisor since 1 September of 1986.

Q. And that's been with the Public Utility Tax Section?

A. That's correct.

Q. What are your duties?

[II-181] A. I supervisor a group of agents who audit the reports required to be filed by public utilities with the Tax Commissioner.

Q. How long have you been employed by the Department of Taxation?

A. For 20 years.

Q. What is your educational background?

A. I hold a Bachelor of Business Administration from from Ohio University.

Q. Could you briefly outline for the Board your employment history after graduating from Ohio University?

A. I was hired by the Department of Taxation in September of 1972. I was assigned to the Columbus District Office in the sales and use tax area. I worked there for approximately a year, and then was reassigned to the corporate franchise tax area.

I worked in that area as an agent until 1980, at which time I transferred to the Public Utility Tax Division and worked there as an agent auditing returns until 1986, at which time I was moved up to a supervisory position.

Q. In your capacity in the last — how many years have you worked in the public utility tax section?

A. It would be almost 13 years now.

[II-182] Q. During that time, have you had occasion to become involved with natural gas companies and pipeline companies —

A. Yes.

Q. — as far as their public utility tax reporting?

A. Yes.

* * * *

[II-184] * * * *

Q. Bill, could you read the definition of "natural gas company" as set forth in 5727.01(E)(4), please?

A. 5727.01(E)(4) states, "Any person is a natural [II-185] gas company when engaged in the business of supplying natural gas for lighting, power or heating purposes to 3 consumers within this state."

Q. Is that the statutory definition of natural gas company that was in effect during the audit period here which ran roughly from October of '86 through December of 1990?

A. Yes.

Q. Under what circumstances would a seller of natural gas to consumers in this state be considered by the Public Utilities

Commission to be a "natural gas company" within the meaning of the statute?

* * * *

[II-186] * * * *

THE EXAMINER: Mr. Hubbard, would you like to restate your question.

MR. HUBBARD: I asked the question as Public Utility Tax Section, but I would be glad to say it again.

BY MR. HUBBARD:

Q. Under what circumstances would a seller of natural gas to consumers in this state be considered by the Public Utility Tax Section to be a "natural gas company" within the meaning of the statute?

A. An entity would be considered a natural gas company when it's engaged in the business of supplying natural gas to consumers within this state. To be considered supplying gas, the seller of the natural gas to the —

* * * *

[II-188] * * * *

Q. Can you continue from there?

A. The seller of the natural gas to consumers would have to deliver the natural gas to consumers over pipeline facilities that were owned by the seller of the natural gas or controlled by it.

Q. By "controlled," what do you mean?

A. It would be possible that a company could lease pipeline facilities from another entity and they could move the gas over that pipeline having control over it, that they were operating the facility.

Q. Under what circumstances would a seller of [II-189] natural gas to consumers in the state not be considered by the Public

Utility Tax Section to be a natural gas company within the meaning of the statute?

* * * *

THE WITNESS: A seller of natural gas who is considered to be a marketer or broker of natural gas and does not own any facility points or control any pipeline facility to deliver such gas would not be considered a natural gas company within the definition stated here.

BY MR. HUBBARD:

Q. You mentioned facilities or pipeline facilities, by that what do you mean?

A. The actual pipeline and all equipment hooked up [II-190] to it to move the gas to a certain point. You have regulating equipment, compressor equipment and a lot of other equipment that's involved in moving the gas.

Q. To the knowledge of the Public Utility Tax Section, do the companies that file as natural gas companies for public utility tax purposes require the criteria that you have just testified to for being a natural gas company?

A. Yes. To meet the criteria that you have.

Q. What sources of information do you use to acquire knowledge as to whether the criteria have been met?

A. Information supplied by the company as to their operation, information they may submit to the Public Utilities Commission of Ohio, information that they may be supplying to the Federal Energy Regulatory Commission. All of these would go into determining whether such company would be qualified as a natural gas company under 5727.01(E)(4).

Q. Under the public utility tax law as applied by the Public Utility Tax Section, is there a distinction between pipeline companies and natural gas companies?

A. Yes, there is.

Q. And I'd like to refer your attention to the definition of pipeline company that's contained in Section 5727.01(E)(5). Could you read that for the [II-191] record?

A. 5727.01(E)(5) states "Any person is a pipeline company when engaged in the business of transporting natural gas, oil or coal or its tariffs through pipes or tubing either wholly or partially within this state."

Q. Does the Public Utility Tax Section draw a distinction between a pipeline company and a natural gas company?

A. Yes.

Q. Okay. What is that distinction?

A. A pipeline —

* * * *

[II-193] * * * *

THE WITNESS: A pipeline company will move a commodity; in this case, natural gas. They will move it through their transmission system, and it is called a transmission system under Federal Energy [II-194] Regulatory Code definition. And such gas will be moved to a point where it is usually given to a local distribution company.

They do not deliver to the end consumer. They deliver to another entity who then delivers the gas to the end consumer. The natural gas companies are companies that supply gas to residential, commercial and industrial customers within the state.

The pipeline company brings the gas to the local distribution company, but not does not supply it to the end users.

BY MR. HUBBARD:

Q. Are the pipeline companies typically engaged in selling the commodity itself as opposed to selling the service of transporting it only?

A. I would say currently they are involved more in the transportation of the natural gas.

Q. Was that true during the 1987 through 1990 period?

A. That I would not be sure about without going back and looking at reports filed by the pipeline companies.

Q. When referring to pipeline companies, is the term "transmission" proper to use?

A. Yes.

Q. Is that distinguished from some other kind of [II-195] property that is used to transport natural gas?

A. Yes. Within the property classification of a natural gas pipeline company, you have production plants, you have storage plants, you have transmission plants, you have distribution plants, and you have general plants. Each one has a specific way of being used which differentiates it from a different class, so they are bound by the particular function they perform.

Q. Okay. Is there a distinction between distribution and transmission property?

A. Yes, there is.

Q. What is that distinction?

A. The transmission property is the property that's bringing the gas, which could be from a wellhead or a storage area, or from a production area to an interconnection with a distribution point. Then it connects with this distribution point. The pressure of the gas is lowered at that point, and then it's put into the distribution system to go to the end user.

Q. So it has to go through a distribution system in order for it to be delivered to the end user, customer?

A. Yes.

* * * *

[II-196] * * * *

Q. Is it necessary in order for the gas to be usable by the end user for it to undergo this depressurization at some point before it's usable by the end user?

A. Yes.

Q. As applied by the Public Utility Tax Section in order to be a pipeline company, would it be necessary to own transmission facilities?

A. Yes.

Q. Would that also be true for a natural gas company?

A. Yes.

Q. I am asking whether it would be necessary in order to be a natural gas company that that company have transmission property as you have used that term?

A. A natural gas company?

Q. Right.

A. No. A natural gas company would have to have distribution property. They could have transmission property, that is possible, but they would have to have [II-197] distribution property moving and supplying gas to the consumer.

Q. Okay. You're defining distribution property as property that is used to deliver the natural gas to the consumer?

A. Yes.

Q. I have just a brief question or two about Exhibit 5. Just a clarificatory matter on a small point. This has been previously identified as Appellant's Exhibit 5; a printout of companies that are filing as natural gas companies for public utility tax purposes that actually filed for the tax years 1987 through 1991. Could you inform the Board as to why there are some Ys in these columns and there are also some N's and what the significance of that is?

A. The Ys indicate that a particular company for a particular year did file a tax return. Where there is an N, it indicates that the company did not file a tax return, nor was it required to file a tax return by the Tax Commissioner.

MR. HUBBARD: I have no further questions of the witness at this time.

THE EXAMINER: Thank you, Mr Hubbard. [II-198] Mr. Peters, I would like to apologize. I called you Mr. Peterson. Mr. Duffy, do you have any cross-examination for the witness?

MR. DUFFY: * * * I have some questions, yes.

CROSS-EXAMINATION

BY MR. DUFFY:

Q. Mr. Peters, I would like to clarify a few things that you have testified to today. First of all, you said a transmission company could not sell gas directly to end users; is that correct?

A. That's my understanding.

Q. Might you be wrong in that understanding in that they can only not do that when the area is serviced by a local distribution company?

A. It could be possible that a pipeline company is delivering gas directly to a customer. I am not aware of anybody in Ohio that is doing that. It is possible that I could be wrong. It could be going on in other states.

Q. Well, for example, if there were testimony in [II-199] this case that it was done at the General Motors Defiance Foundry plant for years and years before the Ohio Gas Company was formed, would that surprise you?

A. That would be something I was not aware of.

Q. Okay. This occurred during the '80's when you were working for the public utilities division.

THE EXAMINER: Is that a question, Mr. Duffy?

BY MR. DUFFY:

Q. I'm saying that's what the testimony is. You don't have any knowledge of the fact that a natural gas company service area was expanded to include the Defiance Central Foundry plant, and that prior to that time the G.M. plant was served by a transmission company or pipeline company as you have called it?

A. No, I was not aware of that.

Q. These end users of natural gas, industrial end users, they could have their own regulation equipment, can't they?

A. That could be possible.

[II-200] Q. So it's not necessary to have a distribution company deliver the gas to their plants in order to use it, is it?

A. That could be possible.

Q. But you would agree that regardless of whether natural gas is delivered to an industrial consumer in Ohio by a local distribution company, a pipeline company or anybody that it's going to come in through a pipe or a conduit, isn't it?

A. Yes, it would come in through a pipeline.

Q. A pipe or some type of enclosed structure. Prior to 1982, could companies market gas directly to end users if they were not a regulated utility?

MR. HUBBARD: Could I have a repeat of that question. I didn't get the date, the year.

THE EXAMINER: I believe Mr. Duffy said prior to 1982.

MR. HUBBARD: Okay.

THE WITNESS: I could not say.

BY MR. DUFFY:

Q. Okay. Are you aware that at some point in time the orders were issued by the Federal Energy Regulatory Commission allowing this to occur, and that is why you have these marketers of natural gas coming into existence?

A. Yes, I was aware of.

Q. Okay. Did Ohio do anything to amend its tax laws as the Federal Energy Regulatory laws changed?

A. There was no change in the statute definition or [II-201] procedures to tax natural gas companies.

Q. The word "supplying" in the phrase "supplying natural gas" is used in the definition of a natural gas company, isn't it?

A. Yes, it is.

Q. Does the department have a regulation defining the word "supply"?

A. Not that I am aware of.

Q. Do they have any written orders or instructions to the Tax Commissioner or to tax agents on this?

A. Not that I am aware of.

Q. Have you ever seen any cases where the term has been defined by the Board of Tax Appeals or any court?

A. No, I have not.

Q. How did you develop your policy then?

A. This is a policy that has been passed on to me from people who were employed there previously.

Q. So you are talking about a policy that's just been explained to you?

A. Yes.

Q. You talked about a company leasing a pipeline. Are you aware of anyone who does this?

A. Yes, I am.

Q. Who is that?

* * * *

[II-203] * * * *

THE WITNESS: The Verona Natural Gas Company leases a pipeline facility which they operate. They do not own the pipeline, they operate it.

BY MR. DUFFY:

Q. Who do they lease it from?

A. From the City of Verona.

Q. Is that the only one that you are aware of?

A. Yes, that is.

Q. You have talked about ownership or control. I take it that the concept of ownership can include either legal title or equitable title to the property. By "equitable title," I mean having the lease. Is that what you mean by "ownership," or do you include — do you think that ownership means having legal title to a control, meaning lease?

A. The way I am stating it, the ownership is the actual control and title to it, and the leasing is a lease which the company operates the pipeline.

Q. On behalf of somebody else or for their own benefit? Or could it be both?

A. It's conceivably could be both.

Q. Is there any written document in the department [II-204] that defines what ownership or control is within the meaning of the testimony you have given here today?

A. No, there is not.

Q. Have you had occasion to look at any of the contracts that General Motors Corporation might have regarding transportation of natural gas into Ohio?

A. No, I have not.

Q. Have you had any occasion to look at any of the contracts that a company like Mobile Natural Gas, Inc. might have with regard to the transportation of gas into Ohio?

A. No, I have not.

Q. So you don't know whether they have any control over the facilities or not then, do you?

A. Not on that basis, no.

Q. Can a contract, in the view of the Public Utility Tax Division, create a right to control when there is no actual operation by the person contracting for the right to use the property?

A. We would not consider someone who has contracts to have their gas moved over someone else's pipeline as the operator. We consider the operator the actual company which maintains the lines and operates the lines.

Q. So you require operation, not just the right to [II-205] require that they move your gas for you?

A. Yes. You have to operate the pipeline.

Q. Having the right to nominate and to require that it be done in lieu of anything else isn't sufficient control in your mind?

A. No, it's not.

Q. Was this policy developed after 1982, because before 1982 it wouldn't have happened?

A. That's probably what would have come into play sometime after that as the marketing of natural gas changed.

Q. Why was it necessary for the department to develop this policy?

A. I believe since I was not involved in that that a distinction had to be drawn between the various types of entities that were supplying natural gas.

Q. If someone sells natural gas to General Motors, say, in the State of Texas or the State of Louisiana, and title passes and delivery passes to General Motors, possession passes to General Motors down there, even if that company were a natural gas company in Ohio and filing returns for the money that it was paid on that sale it would not be gross receipts from business done within Ohio, would it?

A. The money that would be reported on the gross [II-206] receipts report would be transportation charges for —

Q. I didn't say transportation charges.

MR. HUBBARD: Allow him to answer the question.

BY MR. DUFFY:

Q. I said the sale of the natural gas. Are you going to assume some different facts in answering my question?

A. No.

Q. Okay. In case you misunderstood me, there is no transportation. This is just a sale with a transfer of title and possession in which General Motor arranges for transportation with someone else. The receipts from the sale of the gas at that point by the natural gas company, even if it did file an Ohio gross receipts excise tax return, would not be gross receipts from business done within Ohio, would it?

A. If that company did not make the sale. I'm not sure who has made the sale in your scenario.

Q. The company — the natural gas company did make the sale. The sale was just made outside of Ohio, as opposed to inside the state of Ohio.

A. When you say — You are talking about the local distribution services company that services the area [II-207] the industrial customer is located in?

Q. They may be a producing company as well as a distribution company. That can occur, can't it?

A. Yes. They could have production facilities.

Q. And they could have production facilities outside the State of Ohio, too, couldn't they?

A. Yes, they could.

Q. Let's go back to my question. If they sold some production facility located outside the State of Ohio and title and possession of the gas passed at that point and the company derived no other revenue other than from that out-of-state sale on that particular transaction, that revenue would not be gross receipts from business done within Ohio, would it?

A. We would not tax that as gross receipts — as Ohio intrastate gross receipts.

Q. What about if there was a contract for sale and then there was a separate contract for delivery and there was delivery into Ohio? What portion of the receipts would be taxed?

A. We would probably look at where the gas is coming from. If the gas is just going into a storage pool here in Ohio and the natural gas company is required to provide natural gas service to it, that would just be considered an Ohio sale because the sale would be [II-208] coming from a pool here in Ohio to meet the obligation of the contract to deliver gas to the customer.

Q. Local distribution companies no longer just sell tariff gas, do they?

A. No, they do not.

Q. They sell nontariff gas also?

MR. HUBBARD: Could we have a time frame for that?

BY MR. DUFFY:

Q. When did you become aware that local distribution companies were selling nontariff gas?

A. I don't know if I could give you a year on that.

Q. Has it been more than a year ago?

A. Probably.

Q. They do sell nontariff gas to industrial customers just like marketers do, then don't they?

A. I believe they do.

MR. HUBBARD: Again, we are talking about a time frame that may be outside the audit period?

MR. DUFFY: What difference does it make?

MR. HUBBARD: Well, I am just asking. You're asking now as opposed to the audit period?

[II-209] MR. DUFFY: He doesn't know what they were doing. Either they were or they weren't.

MR. HUBBARD: Okay. Just so that's clear that he's not testifying to the audit period.

THE WITNESS: I believe they are doing that. Without looking at one of their reports, I cannot state for certain that they are selling both types of gas.

BY MR. DUFFY:

Q. When they are selling nontariff gas, are they still supplying to the customer?

A. If there is no differentiation between tariff and nontariff, it says supplying nature gas.

Q. What if all they do is arrange for the sale and somebody else delivers it?

A. Then we would not consider them a natural gas company, if they are merely marketing or brokering the gas.

Q. I am saying that a local distribution company is selling nontariff gas, but they don't actually deliver it to the end user, somebody else does.

A. That would be a sale of gas by the local distribution company because they are selling the gas.

Q. But it's not supplying

A. (Witness nodded.) In that scenario.

[II-210] Q. Sorry. You're indicating —

A. In that scenario, they would not be directly supplying if they are arranging for the gas to be moved by some other means other than their own system.

Q. Okay. So if I understand your definition of supplying, it encompasses distribution to the end user?

A. Yes. They would be supplying natural gas to the end user through their distribution system.

Q. Do you know why the public — do you know why there is a — Strike that. Are you aware of the definition of a natural gas company in Section 905.03 of the Revised Code?

A. I am aware that it is significantly different than the one contained in 5727.01.

Q. I'd like to refer you to Exhibit 4 which was marked here previously. It's a copy of Revised Code Section 905.03. I would refer you specifically to subdivision (A)(6) of that definition. Take a moment to read it, please.

A. (Witness complies.)

Q. You would agree, would you not, that the first part of that definition, and I will read it to you, the phrase that says, "A person is a natural gas company when engaged in the business of supplying natural gas for lighting, power and heating purposes to

consumers [II-211] within this state." That is the same definition that you find in 727.01(D)(4), isn't it?

A. Yes, it is.

Q. Okay. And further on in there they talk about a producer being relieved of the obligation of compliance with certain sections of Title 9 of the Revised Code as long as that producer does not engage in the transportation or does not engage in the distribution of gas to consumers. Doesn't that seem to imply in your mind that distribution — that if you are not distributing natural gas, you're still a natural gas company?

A. The implication in that section would seem to lead to that.

Q. Do you know whether or not the Public Utility Tax Division has considered that implication when adopting the policy that you just described here?

A. No. I do not know if they have or not.

MR. DUFFY: I don't have any further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard.

MR. HUBBARD: Yes, your Honor.

[II-212] REDIRECT EXAMINATION

BY MR. HUBBARD:

Q. Bill, with respect to that last question, the part of the definition in the Public Utility Regulatory Law defining natural gas company, it says — a reference is, "A producer of natural gas is not required to comply with the jurisdiction of the PUCO if it doesn't distribute gas." That's with respect to producers, right?

A. The language does talk about producers supplying gas and gas being produced by such producers.

Q. So can the inference be drawn that the production is a form of supply with respect to that definition?

* * * *

[II-214] * * * *

Q. I will amend my question to does the fact that the statute references producers of natural gas indicate to you that production may be a form of supplying?

A. That could be taken from the way it's written here.

MR. HUBBARD: I have no further [II-215] questions of the witness, your Honor.

THE EXAMINER: Mr. Duffy, recross.

RECROSS-EXAMINATION

BY MR. DUFFY:

Q. Doesn't that provision talk about producers selling natural gas to consumers as long as they don't distribute what they sell?

A. The term "selling" or "sales" is not used in here. It talks about a producer supplying to one or more gas or natural gas companies such gas that's produced by the producer.

Q. But that section, doesn't it make a distinction between consumers and other public utility consumers, and other public utilities are not included within the meaning of that phrase "consumers" in there, are they?

A. I don't know.

MR. DUFFY: Okay. Thank you. I have nothing further.

THE EXAMINER: Thank you, Mr. Duffy.

Mr. Hubbard, anything further?

MR. HUBBARD: No, your honor.

THE EXAMINER: Mr. Peters, thank you very much. You may step down. (Witness excused.)

* * * *

[II-225] * * * *

Thereupon, Appellee's Exhibit H was received into evidence and made a part of the record herein.

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[II-229] * * * *

Thereupon, Appellee's Exhibits A, B and C were received into evidence and made a part of the record herein.

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* * * *

[II-232] THE EXAMINER: We can go back on the record.

While we were off the record, Mr. Hubbard reviewed what had previously been received into evidence as Appellee's Exhibit H.

Mr. Hubbard, if you would like to elaborate on what occurred off the record.

MR. HUBBARD: Thank you, your Honor.

What I have done is taken the pages of the Ohio Corporate Franchise Tax Return certified by the Tax Commissioner and excised or deleted from those pages the ones that had financial information on them.

In some instances, I wanted a particular page still in the record for purposes other than disclosing of the company's total figures, and have deleted those amounts on those particular pages so that all that's left is information concerning the Ohio contacts that the company had with the state.

I believe it's such that it's not possible to — what I have done by deletion, you can't see under those figures. So there shouldn't be any information in there that would cause Mobile Natural Gas Company any concern.

I have also noted that where I have [II-233] deleted it, and I signed by my name to it indicating that I deleted it.

THE EXAMINER: All right.

Mr. Duffy, aside from your relevancy objection that you raised previously, which I'll assume is a continuing objection regardless of whether portions of this exhibit are redacted or removed, would you like to make a statement for purposes of the record?

MR. DUFFY: Mr. Hubbard's statement about what he's done with regard to removing certain pages of returns and deleting information on other pages is accurate. It's not for me to say whether that will satisfy the concerns of Mobile or not.

THE EXAMINER: Thank you, Mr. Duffy.

As I had previously indicated, the interested parties may file a brief with the Board by May 26th, 1993 regarding the preliminary receipt of this document marked Appellee's Exhibit H into evidence.

In the event that there is no such brief filed, my ruling will become final, only subject to the ordinary course of the Board's review of the records in this case.

* * * *

[Filed July 9, 1993]

[11] that GM required for the operation of various facilities in both Ohio and Michigan. Neither dictionary definition requires that the seller (supplier) actually deliver the item furnished to the specific location or facility where it will be used or consumed by the buyer.[7]

The Commissioner's application of the term "supplying" in R.C. 5727.01(E)(4) is also inconsistent with the term "supplying" as used in R.C. 4905.03(A)(6). There, the term "supplying" is used in an identical context. However, that definition of a "natural gas company" contains exceptions for certain activities not included in R.C. 5727.01(E)(4). In addition, that definition states that certain persons who might otherwise be a "natural gas company" can apply for relief from regulation by the Public

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[7] GM has also alleged in its notices of appeal to this Board that the Commissioner's application of R.C. 5739.02(B)(7) to deny the exemption from Ohio use tax claimed here burdens interstate commerce and, thus, violates the Commerce Clause of the United States Constitution. While this Board cannot decide the constitutional issue presented by GM (*Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229; *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, *syl. 1, appeal dismissed,* 365 U.S. 466 (1961)), the Commissioner admitted at the hearing that any natural gas purchased outside the state of Ohio by GM which is then transported to Ohio for use by GM could never qualify for exemption from taxation under his application of R.C. 5739.02(B)(7). Clearly, Ohio cannot subject property purchased outside of Ohio to tax when that property would not be subject to tax if purchased inside of Ohio. *Boston Stock Exchange v. State Tax Commissioner* (1977), 429 U.S. 318; *American Modulars Co. v. Lindley* (1978), 54 Ohio St. 2d 273, *cert. denied*, 439 U.S. 911 (1978); *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St. 2d 465. Accordingly, this Board should not accept a construction of a statute that would conflict with the Commerce Clause of the United States Constitution.

OHIO BOARD OF TAX APPEALS

Chrysler Corporation,	)	CASE No. 91-K-1523
	)	
Appellant,	)	
	)	
vs.	)	(SALES AND USE TAX)
	)	
Roger W. Tracy, Tax	)	DECISION AND ORDER
Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

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This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on November 19, 1991, by appellant, Chrysler Corporation. Appellant appeals a final order of the Tax Commissioner dated September 30, 1991, in which he denied appellant's objection to the assessment relating to the period of January 1, 1987 through June 30, 1990, but conditionally remitted a portion of the penalty.

In its notice of appeal, appellant specifies the following as error committed by the Tax Commissioner in rendering his final order:

"1. The Tax Commissioner erred in finding that the Appellant is subject to sales tax on the purchase of natural gas from Yankee Gas Company and in holding that Yankee Gas Company was not a natural gas company as defined in R.C. [section] 5727.01. Purchases of natural gas from a natural gas company as defined in R.C. [section] 5727.01 are exempt from the sales tax pursuant to [section] 5739.02(B)(7). Yankee Gas Company properly sold natural gas through a pipeline to the Chrysler Twinsburg Stamping Plant and such sales by Yankee Gas Company and purchases by Chrysler were not subject to the tax under [section] 5739.02(B)(7). Yankee Gas Company is a natural gas company engaged in the business of supplying natural gas for lighting, power or heating to consumers within the State of Ohio. Yankee Gas Company is not engaged in some other primary business to which the supplying of natural gas is subordinate, does not supply natural gas to tenants, nor is it engaged in producing, refining, or marketing of petroleum or petroleum products. The purchases of natural gas from Yankee Gas Company are not subject to the Ohio sales tax.

"2. The Tax Commissioner erred in not remitting entirely the sales tax penalty, the use tax penalty and the pre-assessment interest."

This matter is now considered by the Board of Tax Appeals based upon appellant's notice of appeal, the statutory transcript certified to this Board by the Tax Commissioner pursuant to R.C. 5717.02, the evidence presented at the hearing held before

this Board on August 12, 1992, and the post-hearing briefs submitted by the parties.

Throughout the period at issue, appellant purchased natural gas for heating its plant located in Twinsburg, Ohio. All of appellant's purchases at issue were made pursuant to a "Natural Gas Sales Agreement" ("Agreement") originally entered into between appellant and Yankee Resources, Inc. ("Yankee Resources"), on November 6, 1986, which included several subsequent price modifications thereto. Payments made by appellant for its purchases of natural gas were remitted to Yankee Resources until February 1988 when its intermediate holding parent corporation, Yankee Gas Company ("Yankee Gas") was acquired by Access Energy Corporation ("Access Energy"). From February 1988 throughout the remainder of the assessment period, appellant remitted payment for its natural gas purchases to Access Energy.

Appellant was assessed for its purchases of natural gas for the audit period and thereafter filed a petition for reassessment and remission of penalty on the basis that its purchases were exempt from sales tax pursuant to R.C. 5739.02(B)(7). The Tax Commissioner denied appellant's objection to the assessment on the basis that appellant had failed to demonstrate that its purchases of natural gas were from a natural gas company as defined in the Revised Code. Appellant then filed its notice of appeal with this Board.

We begin our review of this appeal by recognizing the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St. 3d 121. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut that presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St. 2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St. 2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St. 3d 213.

As a preliminary matter, we note that R.C. 5739.02 levies an excise ("sales") tax on all retail sales made in Ohio. A similar excise ("use") tax is imposed by virtue of R.C. 5741.02. If the acquisition of an item is exempt from sales tax, it follows that it is also exempt from use tax. R.C. 5741.02(C).[1]

In the present case, appellant argues that its purchase of natural gas is not subject to taxation based upon the exemption enumerated in R.C. 5739.02(B), which provides in pertinent part:

"The tax does not apply to the following:

"***

"(7) Sales of natural gas by a natural gas company, of electricity by an electric company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code[.]"

Accordingly, the crucial issue which must be determined by this Board is whether Yankee Resources or Access Energy constitutes a natural gas company for purposes of R.C. 5739.02(B)(7). As referenced in R.C. 5739.02(B)(7), the term "natural gas company" is defined in R.C. 5727.01, which provides in part:

"As used in this chapter:

"(A)'Public utility' means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company,

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[1] Given that the analysis of the application of the sales and use tax provisions is essentially identical in this context, we will refer only to the applicable sales tax provisions throughout the remainder of this decision and order.

water transportation company, heating company, rural electric company, or railroad company.

"***

"(E) Any person:

"***

"(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state[.]"

Thus, in order to qualify as a natural gas company, the entity at issue must be in the business of supplying natural gas to Ohio consumers for the purpose of lighting, power, or heating. Given the arguments raised by the parties, we also find it appropriate to note the provisions of R.C. 5727.02:

"As used in this chapter, 'public utility,' 'electric company,' 'natural gas company,' 'pipe-line company,' 'water-works company,' 'water transportation company' or 'heating company' does not include:

"(A) Any person that is engaged in some other business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental;

"(B) Any person that supplies electricity, natural gas, water, water transportation, steam, or air to its tenants, whether for a separate charge or otherwise; or

"(C) Any person whose primary business in this state consists of producing, refining, or marketing petroleum or its products."

Although appellant introduced into evidence the Agreement and an informational brochure which Access Energy provides to certain of its potential customers, appellant has not directed this Board's attention to any of the specific terms of either document in support of its argument. We therefore set forth those portions of each document which we find particularly relevant.

We first refer to the Agreement which provides in part:

"THIS AGREEMENT made and entered into on the date specified with the execution hereof by and between YANKEE RESOURCES, INC. ('Seller') and CHRYSLER CORPORATION ('Buyer'), a customer of The East Ohio Gas Company ('East Ohio').

"R E C I T A L S

"WHEREAS, Buyer is a customer of The East Ohio Gas Company (hereinafter called 'East Ohio') desiring to acquire natural gas ('gas') supplies and to obtain delivery of such gas to its facilities through East Ohio pipelines; and

"WHEREAS, Seller is in the business of acquiring natural gas supplies; and

"WHEREAS, Buyer desires to purchase gas supplies for its use from Seller;

"NOW, THEREFORE, in consideration of the mutual covenants contained herein, and other good and valuable consideration, the parties do hereby covenant and agree as follows:

"1. Agreement: Subject to the terms of this Agreement, Seller does hereby agree to sell to Buyer on a best efforts basis and Buyer does hereby agree to purchase during the continuing terms of this Agreement the volumes described herein.

"***

"3. Delivery Point and Facilities: Seller will sell and deliver gas to Buyer at the Delivery Point pursuant to the terms and conditions hereof. The term 'Delivery Point' shall mean the point or points of interconnection between Seller's supply of gas and the pipeline facilities of East Ohio for ultimate delivery to Buyer. The Delivery Point shall be at the inlet side of the various metering stations determined by the Seller hereunder. Seller shall be solely liable and responsible for said gas prior

to the time of delivery thereto to Buyer, and Buyer shall be solely liable and responsible for said gas thereafter.

"***

"6. Delivery of Gas and Purchase Quantities: Buyer agrees to purchase all of its gas requirements from Seller, other than those volumes of gas Buyer elects purchase from East Ohio pursuant to its regular service tariff, at the location(s) described in this agreement. It is estimated that such volumes shall be up to 2,150 Mcf of gas per day. Buyer herein affirms that it will purchase volumes from no other supplier, other than East Ohio, during the term of this Agreement. Purchases hereunder shall be deemed the first gas through the East Ohio meter at the Delivery Point each month. For information purposes only, Buyer's estimated monthly gas requirements are set forth on Exhibit A, attached hereto.

"***

"10. Title and Ownership: Title to and ownership of the gas delivered hereunder shall pass to and vest in Buyer at the Delivery Point. Seller warrants that it has good and marketable title to the gas being sold hereunder as and when delivered. Seller also warrants that such gas will be free and clear of all liens, encumbrances and adverse claims whatsoever which would interfere with or make wrongful Buyer's use of same. Seller agrees to indemnify and save Buyer harmless from all suits, claims, actions, accounts, debts, damages, costs, losses, expenses and other liabilities of any kind or type arising from or out of claims of any person or party regarding the ownership of the gas sold hereunder or Seller's authority to sell such gas."

Access Energy's marketing brochure elaborates upon its business, providing in part:

"Access Energy is the nation's leading index independent natural gas marketer not because of the commodity we provide, but because we develop innovative solutions to customer and supplier needs. From our headquarters in

Dublin, Ohio and offices in Chicago, Houston, San Francisco and Irvine, California, Access Energy manages natural gas deliveries from wellhead to burnertip.

"A creative idea that grew into a major organization, Access Energy began in 1982 as Yankee Resources, Inc. Following a 1988 management buyout, we selected 'Access Energy' as our name to reflect our mission of accessing new markets for our suppliers and customers.

"Today we sell natural gas to more than 8,000 customers representing virtually every type of North American industry and institution. ***

"***

"Access Energy provides more than a commodity. We help our customers become more efficient and effective in managing their natural gas purchases.

"Access Energy created the 'Access+Plus' program specifically to meet the needs of geographically diverse Fortune 500 companies with multiple facilities.

"When, for example, General Electric wanted a company-wide supplier of natural gas management services, GE turned to Access Energy.

"In addition, the world's largest paper company relies on Access Energy to supply natural gas to more than 25 North American plants. ***

"Access Energy also supplies Libbey-Owens-Ford's plants. Flexibility, reliability and responsiveness are equally important to this glassmaking giant. We pride ourselves on our ability to respond to our customers' needs - even under the most difficult circumstances.

"In January 1990, for example, Access used three interstate pipelines and three natural gas supply basins located thousands of miles apart to keep the glassmaker supplied and operational during a frigid month when other plants closed for lack of fuel.

"Honda has set new automotive standards for quality, efficiency and service. Anything short of 100 percent performance is unacceptable. And they place the same ultra-high standards on suppliers. Honda of America's plants rely on Access' expertise for cost-effective responses to transportation, supply and regulatory issues. We even have an Access associate working on-site at Honda headquarters to ensure it.

"***

"In 1986, Access Energy signed the nation's first multi-site contract for delivery of natural gas to quick service restaurants: 35 company-owned Wendy's International Restaurants and 31 company-owned Sister's Chicken and Biscuits Restaurants throughout central and northwestern Ohio. In addition, Access became the supplier to Wendy's Columbus-based bakery and corporate headquarters. ***

"***

"The Access Energy gas supply team is experienced, resourceful and flexible. Our transportation department has the knowledge and creativity to move gas when others cannot.

"We have forged long-term relationships with more than 300 major and independent natural gas producers operating in Appalachia, the Gulf Coast, the MidContinent, the Southwest and Canada.

"Our bonds with North American pipeline companies are equally strong. We are known and respected as the industry leader, and independent marketer with the know-how to match supply with market. We deliver gas to market ... and keep it flowing.

"While Access Energy is an old gas marketing company by industry standards, we are a young enterprise. We are a team of professionals with a tradition of innovation backed by expertise.

"Access became the first national independent marketer by aggressively seeking new ways to serve our customers. We invented the concept of total management of natural gas from wellhead to burnertip.

"Responsible for many industry first and regulatory changes, Access was the earliest transporter of direct purchase gas on many pipelines systems. We were the first marketer to export gas to Canada.

"Access was the first to serve commercial multi-sites, including hotels, restaurants, bowling alleys and laundromats. We were ahead of the pack in establishing the industry's first national accounts program for geographically diverse Fortune 500 companies."

Also included in Access Energy's informational brochure is an overview of the company which provides in part:

"Founded: Launched in 1982 as Yankee Resources, Inc., we were the first national independent natural gas marketer. Taking title to all gas bought and sold, we created the concept of direct purchase agreements between suppliers and customers. Our early transactions shaped the natural gas marketing industry of today.

"Philosophy: We secure access to markets and supply sources for industry participants while providing access to new ideas in gas marketing and transportation. We manage the flow of gas from wellhead to burnertip with a commitment to total customer/supplier satisfaction.

"Our Suppliers: We buy natural gas from 300-plus major and independent producers in these North American supply basins: Anadarko, Appalachian, Arkoma, Black Warrior, Gulf Coast, Hugoton, Michigan, Permian, Rocky Mountain, San Juan, Western Canada and Williston.

"Our Customers: We supply 4,000-plus pipeline, local distribution company, utility, commercial, industrial and institutional customers in these states and provinces: Arizona,

California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia and Wisconsin, plus the District of Columbia and Ontario and Quebec, Canada."

We find the testimony of Lance W. Schneier, the former president of Yankee Resources, and current chairman, president and chief executive officer of Access Energy, particularly informative as to the business activities of Yankee Resources and Access Energy. Schneier described the companies' operations as follows:

"Q. Could you describe the business of Yankee Resources, Inc. during the assessment period, and if different at any point prior to that or subsequent to that? And the assessment period is from January of 1987 through June of 1990.

"A. Actually the business of Yankee Resources has remained constant throughout this decade, throughout the first ten years of our existence, that is 1982 through 1992.

"We are what is referred to in the natural gas industry as independent natural gas marketers. Those words mean, first, independent means that we are not affiliated or associated with any other industry segment, meaning we're not associated with a producer of natural gas. We're not associated with any pipeline company, with any local distribution company or any other public utility. That makes us independent.

"We are a marketer of gas, meaning that we acquire natural gas and provide the service using public utility or pipeline systems for the transportation of that gas for end-use customers, typically industrial customers. And also sell to some local distribution companies[.]

"***

"Q. Could you describe the circumstances and changes in the natural gas industry that led to the creation of private gas marketing companies such as Access Energy and Yankee?

"A. Originally the concept of gas marketing companies systems back in the gas curtailments of the 1970's when local distribution companies, particularly in Ohio, did not have sufficient gas supplies available to serve their customers.

"So in 1973, the Public Utilities Commission set up a procedure called the Self Help Program, whereby a producer of natural gas could directly sell their gas to end users, such as Chrysler or General Motors or General Electric.

"These firms would be interested in purchasing gas directly from producers because they couldn't get all the gas they needed from Columbia Gas Ohio or East Ohio or whomever. The gas was, of course, delivered through the pipeline system or transported through the pipeline system perhaps.

"Not surprisingly in retrospect, entities merged during that era to join those producers and those end users, sometimes they were brokers, meaning they would find a customer, find a producer, link them together, take a fee.

"And also they were in their infancy, a few marketers, being they would purchase the gas from the producer, take title to it, and then resell it to the end user.

"These were all pursuant to, as I said, PUCO program in 1973 that was expanded to the neighboring states, Pennsylvania Public Utilities Commission, Illinois Commerce Commission. Some of the neighboring states adopted the same plan because they were also short of gas.

"And then the Federal Power Commission, which is the predecessor to the Federal Energy Regulatory Commission, adopted a similar plan on a national basis. After the curtailments abated in the 70's, in the late 70's, it was determined that this process whereby typically an industrial customer, but not limited just to industrial customers, could go

out and buy gas from whomever they wanted and have that gas transported by a public utility became somewhat institutionalized, and there were other reasons to do so. Most notably price as opposed to security of supply.

"So this concept which was born during shortages became more popular as time went on. And it's now practiced by 350 or 500 companies throughout North America who purchase gas from thousands of producers and sell that gas to hundreds and thousands of end users throughout the country.

"All using the pipeline systems of the regulated public utilities, but, of course, those entities that are supplying that gas are not public utilities in Ohio or any of the other states in which they do business.

"It's grown to the point that nearly 90 percent of the gas that moves through the interstate pipelines is now being transported instead of bought and sold as it was done, let's say, prior to 1976.

"We are a participant in that industry by being one of the oldest natural gas marketers.

"***

"Q. Okay. Could you describe how Access became a successor in interest to Yankee Resources and I think Yankee Gas Company?

"A. In 1988 the management of Yankee Gas Company, myself included, purchased the Yankee Gas Company from its prior owners and renamed it Access Energy.

"Q. Who does Access purchase the natural gas from?

"A. Currently Access purchases natural gas from probably 250 or 300 natural gas suppliers, producers located in Appalachia, the Southwest, mid-continent area, Guld Coast and Canada.

"Q. And was that also true during the audit period?

"A. It would have been true during the audit period, but the number of suppliers would have been less.

"Q. How does the natural gas get delivered to the customers, the end-use customers of Access?

"A. The natural gas that we purchase is delivered by the pipeline systems, which existed throughout the United States, the interconnected grid of interstate pipeline systems.

"For example, we may buy gas in Texas from a well in Texas that's interconnected to a large pipeline system. We'll pay that pipeline system a fee to transport the gas from Texas to Kentucky, where it interconnected with another pipeline system.

"We'll pay that pipeline company a fee to bring it from Kentucky to a point where it interconnects with Columbia Gas of Ohio, then pay Columbia Gas of Ohio a fee to deliver it, if you will, to our customer.

"I use the words transport and deliver with a bit of caution, because an interesting aspect of the way this industry works is that it's all done by displacements. Not only do we not own the facilities, but the gas that is delivered is not the gas that we introduce.

"We buy ten units of gas in Texas and put it into the pipeline, and it's put into the pipeline. What the pipeline company does is take that gas from the well and credit our account for ten units of gas and those molecules are physically moved.

"They may be moved two miles down the road to somebody else, but an equal volume is then credited to our account and gives us the right to have it delivered elsewhere.

"An analogy is ATM, or automatic teller machines. You can put $100 in your bank account and you can go to La Guardia Airport, you go get $100 out. You don't get the same $100 out of the bank that you put in.

"Q. Does Access own or control any physical assets which are used for the distribution of natural gas to consumers?

"A. No, we don't." (Tr. 22-26, 28-29.)

The evidence demonstrates that Yankee Resources and Access Energy located natural gas producers and/or suppliers and customers wishing to purchase natural gas supplies. Although Yankee Resources and Access Energy would *temporarily* acquire title to the natural gas in order to assist in its transportation from producer and/or supplier to customer, neither company owned or controlled any physical assets necessary to produce, transport or distribute natural gas to its customers. Such a limited ownership interest in the natural gas does not outweigh the fact that Yankee Resources and Access Energy do not have the physical capabilities to produce or transport natural gas which might qualify them as natural gas companies.

In addition, the activities of Yankee Resources and Access Energy amply supply Schneier's description of the companies as independent natural gas marketers which simply manage natural gas deliveries. We agree with the Tax Commissioner's conclusion that Yankee Resources and Access Energy are in the business of brokering, or marketing, the commodity of natural gas. As we believe that it was not the intent of the General Assembly to include within the definition of natural gas company those entities which merely market natural gas, we must conclude that Yankee Resources and Access Energy fall outside the statutory definition of a natural gas company as set forth in R.C. 5727.01.

The Tax Commissioner also argues that this Board may rely upon an order of the Public Utilities Commission of Ohio ("PUCO") in which it was determined that Yankee Resources' natural gas marketing activities did not bring it within the definition of a natural gas company for Ohio Public Utility Regulatory purposes. In 1982, Yankee Resources applied to the PUCO for an order granting relief from compliance with the Public Utility Regulatory law reflected in R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4975, on the basis that

it was not a natural gas company within the meaning of R.C. 4905.03(A)(6) or a pipeline company within the meaning of R.C. 4905.03(A)(7).

The regulatory statute then at issue before the PUCO is found in R.C. 4905.03, which provides in pertinent part:

"As used in this chapter:

"(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

"***

"(6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, but where a producer supplies to one or more gas or natural gas companies only such gas as is produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, such producer is not thereby a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same, are subject to the jurisdiction of the public utilities commission. The commission may, upon application made to it, relieve any producer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, so long as such producer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas or so long as such producer does not engage in the distribution of natural gas to consumers."

In ruling upon Yankee Resources' application, the PUCO issued an order determining that Yankee Resources was not a natural gas company or a pipeline company for public utility regulatory purposes, stating in pertinent part:

"2) Yankee Resources is or anticipates being a party to certain contracts pertaining to the purchase of natural gas from independent Ohio gas producers and from public utilities and the sale of such natural gas from these sources to various entities, including industrial end users, other public utilities, and interstate pipeline companies. Yankee Resources' contracts are or will be those involving Ohio producers' sale of all natural gas produced from specified wells to Yankee Resources, those involving spot purchases from public utilities, and those involving buyers of natural gas who agree to pay Yankee Resources for the natural gas production described in the purchase contracts. Approximately 90% of the volumes of natural gas transferred by these contracts is purchased by an interstate pipeline company.

"3) Yankee Resources receives compensation for its role in locating sellers and buyers and assisting them in their transportation arrangements pursuant to purchase and sale contracts. Management of these contracts is involved in the services which Yankee Resources performs. In short, the services performed are that of a marketer or broker of contracts for natural gas which services typically include taking legal title to the natural gas.

"4) Yankee Resources is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas to consumers. Yankee Resources does not engage in the business of transporting natural gas through pipes or tubing either wholly or partly within this state as it has no physical plant through which natural gas is transported.

"5) Sections 4905.03(A)(6), Revised Code, sets forth the definition of a natural gas company as follows:

"A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or natural gas companies within this state.

"6) Section 4905.03(A)(7), Revised Code, defines a pipe-line company as follows:

"A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state.

"7) The Commission is of the opinion that Yankee Resources' activities are not the type which fall under either the definition of a natural gas company or a pipe-line company. Yankee Resources' operations consist of coordinating buyers with sellers of natural gas through certain contractual arrangements and assisting them in making arrangements and transportation of the gas. The applicant owns no physical facilities with which to transport gas. The Commission believes that the marketing or brokering of natural gas contracts is not an activity contemplated by Section 4905.03, Revised Code. Accordingly, the Commission finds that Yankee Resources is not a public utility and is not subject to the obligations imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923, Revised Code.

"It is therefore,

"ORDERED, That the application of Yankee Resources, Inc. for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Revised Code is granted.

"***"

As a result of the PUCO's order, Yankee Resources, and subsequently Access Energy, has never been subject to regulation as a natural gas company or other public utility for local, state or federal purposes. Consequently, for example, they have never

been obligated to, nor have they, hold themselves out to serve a general or indefinite public. Rather, each of these companies has chosen customers and negotiated with them on an individual, contract-by-contract basis. While we find the decision of the PUCO with regard to the application of Yankee Resources to be persuasive and in support of our decision rendered herein, we need not base our decision solely upon the determination of the PUCO given the other evidence pertaining to the business activities of Yankee Resources and Access Energy. Cf. *Akron Transportation Co. v. Glander* (1951), 155 Ohio St. 471.

We note that the Tax Commissioner has also argued that due to the tax filing history of Yankee Resources and Access Energy, the companies do not constitute public utilities and therefore are not natural gas companies. The Tax Commissioner has cited this Board's previous decision in *Central Trust Hardware Company v. Lindley* (Jul. 25, 1979), B.T.A. Case No. 78-C-244, unreported, in which this Board reject the taxpayer's claim to entitlement to sales tax exemption pursuant to R.C. 5739.02(B)(7) for its purchases of steam which was used to heat its building. This Board determined that the definition of "heating company" set forth in R.C. 5727.01 must be read in *pari materia* with the provisions of R.C. 5727.02, which exempted certain entities from the definition of heating company whose supplying of steam was incidental to some other primary business.

In holding that the selling entity did not constitute a heating company for purposes of the exemption enumerated in R.C. 5739.02(B)(7), the Board held:

> "[T]he legislature levies excise taxes on the earnings, inter alia, of heating companies, and, in an apparent attempt to avoid a duplicate tax, the legislature exempted from the sales tax transactions wherein qualifying entities sold utility commodities to consumers. These transactions might avoid all tax if we were to allow Central Trust's claim. Emery would collect no sales tax, and, being excluded from the definition of a heating company by [section] 5727.02, Ohio Rev. Code, would not be required to pay any utility excise taxes either."

Id. at 37.

We find that our reasoning in *Central Trust Company* supports our decision in the present case given the non-public utility status of Yankee Resources and Access Energy. Since these companies are not natural gas companies as defined in R.C. 5727.01, appellant was not entitled to the claimed exemption. Therefore, appellant's first specification of error is not-well taken and is therefore overruled.

Appellant also specifies as error the Tax Commissioner's refusal to remit the entire sales tax penalty and pre-assessment interest which was imposed in the present case. Pursuant to R.C. 5739.13, a mandatory penalty is to be imposed in the event of an assessment. However, the determination of whether to remit the penalty is discretionary. *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St. 3d 67, 69. Ordinarily, the taxpayer must demonstrates that there exists an abuse of discretion on the part of the Tax Commissioner before the determination in refusing to remit a penalty may be reversed or modified by the Board of Tax Appeals. *Id.*; *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483, 485.

Specifically, we note the standard to be applied in determining whether an appellant has demonstrated that there exists an abuse of discretion. In *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, the Supreme Court of Ohio held:

> '"[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. * * *"' *State v. Jenkins*, (1984), 15 Ohio St. 3d 164, 222." *Id.* at 87.

We have already concluded that appellant has failed to meet its burden of proof necessary to support its claim that the Tax Commissioner erred in assessing appellant's purchases of natural gas. In reviewing the entire record, we are unable to conclude that appellant has demonstrated that the Tax Commissioner's decision not to remit the entire penalty constitutes an abuse of discretion.

However, with respect to the additional penalty which was imposed on the pre-assessment interest, we find that the Tax Commissioner was without authority to impose such penalty. *Tramp Enterprises v. Tracy* (Sep. 17, 1993), B.T.A. Case No. 92-R-4, unreported. See, also, *Ernst Enterprises, Inc. v. Tracy* (Dec. 23, 1992), B.T.A. Case No. 91-A-194, unreported. Accordingly to this extent, appellant's specification of error is well-taken and is sustained.

Based upon the foregoing, the Board of Tax Appeals finds appellant's first specification of error to be not well-taken and it is therefore overruled. With respect to appellant's second specification of error, it is sustained only to the extent that the Tax Commissioner improperly imposed a penalty on the pre-assessment interest which was included as part of the assessment in the present case. It is therefore the decision and order of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed in part and reversed in part.

I hereby certify the foregoing to be a true and correct cop of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

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Kiehner Johnson, Chairman

[Filed Feb. 25, 1994]

OHIO BOARD OF TAX APPEALS

General Motors Corporation, Appellant,	)	CASE NO. 91-K-1588
vs.	)	(SALES AND USE TAX)
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	)	DECISION AND ORDER

(Found in the Appendix to the Petition for Certiorari at 6a-19a.)

[Filed July, 28, 1994]

[17] Proposition of Law No. II:

THE COMMISSIONER'S APPLICATION OF THE OHIO SALES AND USE TAX LAWS VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE THE COMMISSIONER ALLOWS THE R.C. 5739.02(B)(7) EXEMPTION, ON SALES OF NATURAL GAS SOLD BY A "NATURAL GAS COMPANY," ONLY TO IN-STATE NATURAL GAS COMPANIES.[10]

The Commissioner interprets R.C. 5739.02(B)(7) to allow an exemption for a consumer's purchases of natural gas *only* where the seller of the gas transports the gas, through its own facilities, to the purchaser *in Ohio*. That is, GM had to purchase the gas *in Ohio* to qualify for the exemption. The Commissioner admits, consequently, that the exemption is only available for natural gas purchased in Ohio.

Since such an in-State sale would be subject to Ohio *sales* tax and not *use* tax, the Commissioner's interpretation eliminates the exemption for all out-of-State sales of natural gas. The result is that natural gas purchased in Ohio from someone who agrees to deliver the gas to the consumer comes tax-free, but gas purchased outside the State and later used in Ohio shoulders a use tax burden in every [18] instance. This "differential treatment of in-

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[10] The BTA held, incorrectly, that it "could rule upon [GM's] constitutional challenges with respect to the Tax Commissioner's application of a statute to a given set of facts," and proceeded to overrule each of GM's constitutional specifications of error. The BTA ignored *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St. 3d 195, 197-98, 625 N.E. 2d 597, 599, *petition for cert. filed* No. 93-1974 (June 7, 1994), where this Court held that "the BTA receives facts but cannot rule on the [constitutional] question[s]." Thus, the BTA's improper constitutional determinations are unlawful and are due no deference. *See also Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, 520 N.E. 2d 229.

state and out-of-state economic interests that benefits the former and burdens the latter" is "virtually *per se* invalid" under the Commerce Clause, *Oregon Waste Sys., Inc. v. Department of Env. Quality of the State of Oregon* (1994), 114 S. Ct. 1345, 1350, and it is certainly invalid here.

The factual underpinnings of GM's Commerce-Clause challenge are straightforward and undisputed. During the audit period at issue in this case (10-01-86 to 06-30-90), GM's Energy Supply Division purchased the great majority of its natural gas requirements from various out-of-State marketers and producers of natural gas, not from the local distribution companies (Supp. 77-78). The gas was delivered by each seller to the initial receiving pipeline (which in each instance was outside of Ohio); in each instance title to the gas passed outside of Ohio, upon delivery to the initial receiving pipeline (Supp. 65, 109-111). GM then arranged for the transportation of this gas (through separate contracts with interstate pipeline companies and local distribution companies) to its various plants on an as-needed basis.

The Commissioner assessed Ohio use tax on each of GM's purchases of natural gas used during the audit period at the facilities in issue.[11] The Commissioner's representative testified before the BTA that no purchase of natural gas which occurs outside of Ohio can ever qualify for the R.C. 5739.02(B)(7) [19]

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[11] Any natural gas used at the plants "directly in manufacturing" was considered to be excepted from tax by R.C. 5739.01(E)(2). *See* Supp. 13-14.

exemption. (R(I). 55-56).[12] This discrimination is unconstitutional:

> Although the Commerce Clause is phrased merely as a grant of authority to Congress to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, it is well established that the Clause also embodies a negative command forbidding the States to discriminate against interstate trade. . . . The Clause prohibits economic protectionism — that is, "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."

Associated Industries of Mo. v. Lohman (1994), 114 S. Ct. 1815, 1820 (quoting *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 273) (citations omitted). This means that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Armco, Inc. v. Hardesty* (1984), 467 U.S. 638, 642, nor may a State "discriminate between [20] transactions on the basis of some interstate element." *Boston Stock Exchange v. State Tax Comm'n* (1977), 429 U.S. 318, 332 n.12.

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[12] *See also* Supp. 22 (examination of the Commissioner's designated representative at the hearing below):

> Q. If G.M. purchases natural gas from a person outside the State of Ohio and that natural gas is delivered to General Motors by the seller to someplace outside the State of Ohio. And thereafter, General Motors arranges to have it transported to its facilities in Ohio through the means of some type of transmission company and/or distribution company that operates in Ohio, is there any[] [way] that that gas will qualify for exemption from taxation under 5739.02(B)(7)?
>
> A. Not under that provision, no.
>
> Q. And is that because the seller did not distribute it or transport it to General Motors in Ohio?
>
> A. Through its facilities, that's right.

The Commissioner's construction of R.C. 5727.01(E)(4) and 5739.02(B)(7) results in out-of-State gas sales being taxed while Ohio gas sales are exempted. This is unconstitutional because "no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Maryland v. Louisiana* (1981), 451 U.S. 725, 754 (quoting *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 458).

By definition, a use tax such as Ohio's "appears to violate the Commerce Clause's cardinal rule of nondiscrimination," *Associated Industries*, 114 S. Ct. at 1820-21, because it is imposed only on goods originating outside the State. *See* R.C. 5741.02(C)(1). At the same time, the "compensatory tax doctrine" can save an otherwise discriminatory use tax *only* if the State can show that its use tax on out-of-State commerce compensates for — "but [does] not exceed" — the amount of the sales tax imposed on in-State commerce. *Oregon Waste Sys., Inc.*, 114 S. Ct. at 1352. Here, the Commissioner cannot make the required showing of equal treatment: There is no sales tax on in-State purchases of natural gas, but gas purchased out-of-State and brought into Ohio is subject to use tax. This violates the fundamental Commerce-Clause principle that a "strict rule of equality" for in-State and interstate commerce "is *the* condition precedent for a valid use tax on goods imported from out-of-state." *Halliburton Oil Well Cementing Co. v. Reily* (1963), 373 U.S. 64, 70, 73.

[21] *Halliburton* itself illustrates the unconstitutionality of the Ohio tax scheme as applied to GM. Halliburton manufactured service trucks in Oklahoma, but shipped the trucks to Louisiana for use there. On those trucks, Louisiana imposed a 2% use tax, defined as "the *cost price* of each item or article of tangible personal property when the same is not sold but is used . . . in this state." *Id.* at 65-66 (emphasis added). Louisiana's 2% sales tax, in contrast, was imposed on "the *sales price* of each item or article of tangible personal property when sold at retail in this state." *Id.* at 65 (emphasis added). The difference between

Louisiana's sales and use taxes was that "overhead" was deductible from the *sales* tax base, but not from the *use* tax base.[13] Thus, Halliburton was not allowed to deduct "overhead" from its use tax base — even though "overhead" would have been deductible if the trucks had been made and sold in Louisiana. *Id.* at 67.

The United States Supreme Court held that allowing the "overhead" deduction only for in-State *sales* taxes, but not for *use* taxes on goods purchased out-of-State, discriminated against interstate commerce and therefore violated the "strict rule of equality adopted in *Silas Mason*.[14] *Id.* at 73. See also *Maryland v. Louisiana* (1981), 451 U.S. at 759 (the "common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce"). Moreover, the Court noted that in applying this "strict rule," "equality . . . is measured in dollars and cents, not legal abstractions." *Id.* at 70. The absence of a deduction for out-of-State manufacturer-users resulted in over $1.5 million in

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[13] This was because the Louisiana use tax was assessed on the "cost price" of the item, defined as the actual cost *without deductions* on account of "labor or service costs, . . . or any other expenses whatsoever." *Id.* (quoting La. Rev. Stat. Ann. § 47:301(3)) (internal quotation marks omitted). In contrast, the Louisiana sales tax was assessed on the "sales price," which did allow such deductions.

[14] *Henneford v. Silas Mason Co.* (1937), 300 U.S. 577, held that a use tax on solely out-of-state goods will avoid Commerce-Clause difficulties if and only if,

> [w]hen the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.

Id. at 584. As the Supreme Court has more recently explained, this "strict rule of equality" means that "the burdens imposed on interstate and intrastate commerce must be equal." *Associated Industries of Mo. v. Lohman* (1994), 114 S. Ct. 1815, 1821.

additional taxes for Halliburton — a "clearly substantial" tax inequality.' *Id.* at 71.[15]

No Supreme Court case after *Halliburton* has ever strayed from "the rule of strict equality" for sales and use taxes. Rather, the Court has repeatedly forbidden the use of similar discriminatory tax exemptions. For instance, *Maryland v. Louisiana*, *supra*, involved Louisiana's "first-use" severance tax, which was imposed on natural gas initially "dried" in Louisiana, but ultimately shipped (98% of it) out of State. [23] Louisiana granted a series of "Severance Tax Credits" and exclusions, which essentially rebated the first-use tax — but to in-State producers and distributors only. The Court struck the tax down as violative of the Commerce Clause, since it "unquestionably discriminate[d] against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions." *Id.* at 756.

And just this last term, in *Associated Industries of Mo. v. Lohman*, *supra*, the Supreme Court again affirmed that "strict equality," not "close enough for government work," is the rule for sales and use taxes. In *Associated Industries*, Missouri imposed an "additional use tax" which was purportedly designed to "compensate" for the sales taxes imposed by localities (Missouri, like Ohio, has a uniform 4% state sales tax, but allows counties and municipalities to impose additional sales taxes on top of the state sales tax). As a result of the widely varying sales tax rates, the use tax exceeds the local sales tax in 53.5% of the local jurisdictions. *Id.* at 1820. The Court held that the "strict rule of equality" rendered Missouri's use tax unconstitutional in those

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[15] Interestingly, the Court in *Halliburton* noted that a similar Ohio tax was saved from unconstitutionality because, by administrative regulation, it had "rejected the Louisiana position" and "excluded labor and shop overhead from the tax base of the out-of-state manufacturer-user" as well as the in-State manufacturer-user, "on the ground that its inclusion might violate the Commerce Clause." *Halliburton*, 373 U.S. at 75 & n.10.

53.5% of jurisdictions where the tax on out-of-State sales was greater than that on in-State sales:

> Missouri's use tax scheme, however, runs afoul of the basic requirement that, for a tax system to be "compensatory," the burdens imposed on interstate and intrastate commerce must be equal. As we observed in *Maryland v. Louisiana*, the "common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." 451 U.S., at 759. See also *Halliburton*, *supra*, at 70 ("[E]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state").
>
> [24] Where a State imposes equivalent sales and use taxes, we have upheld the system under the Commerce Clause. See *Silas Mason*, *supra*, at 584-587. But in Missouri, whether the 1.5% use tax is equal to (or lower than) the local sales tax is a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside. Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods sold locally. The resulting disparity is incompatible with what we have termed the "strict rule of equality adopted in *Silas Mason*." *Halliburton*, *supra*, at 73.

Id. at 1821. The Court agreed with the dissenting Chief Justice of Missouri that "a rule of 'close enough for government work'" never took root in our commerce Clause jurisprudence." *Id.* at 1823.

In other cases, too, the Court has been equally vigilant in striking down other supposedly "compensatory" use taxes which violate — even ever so slightly — the rule of "strict equality." *See*, e.g., *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, *supra*, 114 S. Ct. at 1352; *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue* (1987), 483

U.S. 232, 243-44 ("The exemption . . . affirmatively places interstate commerce at a disadvantage" and violates the Commerce Clause); *Armco, Inc. v. Hardesty*, *supra*, 467 U.S. at 642-43 (exemption of local manufacturers from West Virginia's gross receipts tax violated Commerce Clause); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 331 ("Equal treatment of interstate commerce . . . has been the common theme running through [25] the cases in which this Court has sustained 'compensating,' state use taxes.").[16] *See also American Modulars Corp. v. Lindley* (1978), 54 Ohio St. 2d 273, 376 N.E.2d 575, *cert. denied* (1978), 439 U.S. 911.

Ohio's scheme of imposing use tax on out-of-State natural gas purchases, while exempting in-State purchases from sales tax, plainly violates the oft-affirmed rule of "strict equality." The Commissioner's view, that a seller must deliver the gas to the buyer *in Ohio* to qualify for the exemption, means that only gas sold in Ohio qualifies for the exemption: As the Commissioner's representative himself admitted (Supp. 25), an otherwise-identical, out-of-State sale of natural gas can never qualify for the exemption. This application of Ohio law could encourage consumers who need natural gas for heating or power purposes in Ohio to purchase natural gas in-State to enjoy a significant tax savings. Clearly, this application runs afoul of the central tenet

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[16] Although it did not involve a use tax, *Bacchus Imports, Ltd. v. Dias* (1984), 468 U.S. 263, also holds that such discriminatory tax exemptions are unconstitutional. *Bacchus* involved a 20% excise tax on all liquor sales, coupled with an exemption for pineapple wine manufactured in Hawaii and for okolehao, a brandy distilled from the root of a shrub indigenous to Hawaii. The Court held that Hawaii's law was unconstitutional because it "had both the purpose and effect of discriminating in favor of local products." *Id.* at 273. "By granting a tax exemption for local products [in *Bacchus*], Hawaii in effect created a protective tariff. Goods produced out of State were taxed, but those produced in State were subject to no net tax." *West Lynn Creamery, Inc. v. Healy* (1994), 114 S.Ct. ____, ____ (*slip op.*, at 10) (discussing *Bacchus*).

of the Commerce Clause — that such "preferential trade areas [are] destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. Madison* (1951), 340 U.S. 349, 356. *See also American Trucking Ass'n v. Scheiner* (1987), [26] 483 U.S. 266, 268-87 (tax invalidated because it "exert[ed] an inexorable hydraulic pressure" for truckers "to ply their trade within the State that enacted the measure").

Moreover, when "measured in dollars and cents," a "clearly substantial" tax inequality results. By purchasing the natural gas at issue from out-of-State natural gas companies, instead of from a similarly situated in-State company, GM was assessed $274,560.82 of tax that would not have been assessed had GM purchased the gas in Ohio. This extra tax burden on interstate commerce, like the extra tax burden in *Halliburton*, is "clearly substantial" and violates the Commerce Clause.

For use tax such as the one involved here, the controlling rule is "the strict rule of equality." *Halliburton*, 373 U.S. at 73. The Commissioner's limiting of the "natural gas company" exemption in 5739.02(B)(7) to in-State sales violates that rule. As applied to GM, therefore, the Ohio use tax violates the Commerce Clause of the United States Constitution. Accordingly, the Court should reverse the decisions of the BTA and remand these cases to the Commissioner with instructions to vacate the assessments.

SUPREME COURT OF OHIO

GENERAL MOTORS CORPORATION,

Appellant,

v.

TRACY, Tax Commr.,

Appellee

Nos. 94-642, 94-643 and 94-644.

Decided Aug. 9, 1995.

(Found in the Appendix to the Petition for Certiorari at 1a-5a.)

THE SUPREME COURT OF OHIO

1995 TERM

To wit: October 4, 1995

General Motors Corporation	:	
Packard Electric Division	:	Case Nos. 94-642,
Appellant	:	94-643, 94-644
v.	:	RECONSIDERATION
	:	ENTRY
Roger W. Tracy, Tax	:	
Commissioner of Ohio,	:	(Board of Tax Appeals)
Appellee.	:	

(Found in the Appendix to the Petition for Certiorari at 26a-28a.)

IN THE SUPREME COURT
OF THE UNITED STATES

[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari entered on April 1, 1996